No. 118
Consolidated with Nos. 117, 119, 332, 333 and 334

In the Supreme Court of the United States

OCTOBER TERM, 1955

WASHINGTON PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSIONER OF OREGON;
BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA;
STATE BOARD OF EQUALIZATION AND PUBLIC SERVICE COMMISSION OF WYOMING;
STATE OF NEBRASKA AND NEBRASKA STATE RAILWAY COMMISSION,

Appellants,

v.

UNITED STATES OF AMERICA;
INTERSTATE COMMERCE COMMISSION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BRIEF FOR ABOVE NAMED APPELLANTS

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OPINIONS BELOW

The majority opinion and the dissenting opinion of the three-judge United States District Court for the District of Nebraska (R. 151) are reported in 132 F. Supp. 72. The report of the Interstate Commerce Commisson (R. 25) appears in 287 I. C. C. 611.

JURISDICTION

This action was brought June 25, 1953, in the United States District Court for the District of Nebraska (R. 3) by the Union Pacific Railroad Company and seven other railroads, against the United States of America and the Interstate Commerce Commission, pursuant to 28 U. S. C. 1336, 1398, 2284 and 2321-2325, to enjoin, annul and set aside the order issued January 28, 1953, by

the Interstate Commerce Commission in a proceeding entitled "Docket No. 30297, Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co., et al." Petitions for reconsideration were denied by the Commission on June 10, 1953 (V. II, 1778)*. These appellants intervened as defendants in the Commission proceeding and as plaintiffs in the district court in support of the railroads' suit to enjoin and annul the Commission's order.

The order was issued upon a complaint filed with the Commission by The Denver and Rio Grande Western Railroad Company ("Rio Grande"), a perennially bankrupt and "financial needs" short line railroad, with its western terminus at Ogden, Utah, and its eastern termini at Denver and Pueblo, Colorado. The order (R. 21) requires, among other things, that the Union Pacific and over 200 other railroads establish in connection with the Rio Grande through routes and joint rates "the same" as the joint rates maintained by them on the several commodities named in the order, which comprise about 57,000 carloads, or one-third of the traffic annually that the Rio Grande seeks to divert for a "bridge"[1] haul

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* Because of duplication in page numbering the printed records in these cases, this abbreviation will be used to refer to pages of Volumes I & II, proceedings before the Interstate Commerce Commission.

1 The term "bridge traffic" is used to designate traffic hauled by a carrier on whose line the traffic neither originates nor terminates. A "bridge haul" is the transportation of such "bridge" traffic some part of the distance between its point of origin and its final destination. "Bridge" traffic is most attractive because it is generally least expensive to haul since the "bridge" carrier performs none of the expensive branch line, gathering or switching services required at the point of origin and point of final destination. The Rio Grande's President testified that the reason it is pressing for more "bridge" traffic is that "there is more money in it" than in traffic it originates or terminates.

The traffic the Rio Grande seeks to divert to its line is "bridge" traffic which originates and terminates outside of Rio Grande territory: Joint rates already apply to traffic originated at or destined to points on the Rio Grande.

over its line for the admitted purpose of enhancing and improving its financial position. The traffic originates and terminates on through routes of the Union Pacific and other railroads and has been hauled under joint rates maintained over those routes through Wyoming and Nebraska for 75 years between points in the northwest area, embracing the States of Oregon, Washington, Montana and Idaho, and points in the eastern and southern parts of the United States generally east of the Missouri River. The order would result in short-hauling Union Pacific routes at least 925 miles, subjecting them to very large revenue losses.

Ordinarily, demands for an additional route come from shippers on the ground that existing routes are inadequate and that the *proposed* additional route is shorter and is "needed" to provide "adequate and more efficient or more economic" transportation than that provided by existing routes. The order in this case, however, presents the novel and unique situation of an attempt by the Commission and the Rio Grande to short haul Union Pacific routes which are faster, cheaper and shorter (by as much as 50% in some instances) than any route that could be made via the Rio Grande between the origins and destinations of the involved traffic.[2]

Final judgment and decree of the majority of the district court sustaining the validity of the order "in part" and enjoining it "in part" was entered December 20,

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2 The order here reflects the latest of the Commission's long and persistent efforts to evade or "limit by construction the impact of the short-hauling restriction on its power to establish through routes," recognized and discussed by this Court in *Thompson v. United States*, 343 U. S. 549, at pages 555 and 556.

1954 (R. 229). Notice of appeal was filed February 18, 1955 (R. 230). On March 22, 1955, Circuit Judge Johnsen, presiding member of the district court, entered an order extending to June 1, 1955, the time for filing the record and docketing the cases of all appellants in this Court. The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101(b). Probable jurisdiction was noted by this Court on October 24, 1955.

STATUTE INVOLVED

This appeal involves the following provisions of the Interstate Commerce Act, Part I, 49 U. S. C. 1, *et seq.*, which are set out verbatim in Appendix A hereto:

National Transportation Policy (preceding Section 1), and Sections 1(3)(a); 1(4), 1(5), 3(1), 3(4), 15(1), 15(3) and 15(4).

QUESTIONS PRESENTED

(1) Whether the court erred in refusing to hold that, in this proceeding, brought by the Rio Grande for the admitted purpose of enhancing its financial position by diverting for a "bridge" haul over its line transcontinental through traffic now and for some 50 years moved over Union Pacific routes between points on those routes in the far northwest and points in the eastern and southern parts of the United States, the Commission was prohibited from issuing the order in this case by the provision of Section 15(4) of the Interstate Commerce Act that "[n]o through route and joint rates applicable there-

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3 Jointly with Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, who are filing a brief for those railroads.

to shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs", and that this prohibition may not be evaded or circumvented by the Commission's assertion that in making the order "no consideration has been given to the financial needs" of the Rio Grande.

(2) Whether the court erred in refusing to hold that, in view of the provisions of Section 15(4) of the Interstate Commerce Act (49 U. S. C., § 15(4)), the Commission acted arbitrarily and unlawfully in issuing the order short-hauling Union Pacific routes at least 975 miles, since the Commission found:

(a) That Union Pacific routes have lower rates than the Rio Grande and are shorter, faster, efficiently operated, adequate and have surplus capacity to haul any foreseeable volume of the through traffic involved;

(b) That movement of the same through traffic via the Rio Grande would require over 200 miles additional transportation, at least 24 hours more time in transit, and one or two additional interchange services; and that the Rio Grande maintains higher rates, is less favorably located and has more onerous operating conditions than the Union Pacific or any of the other Western lines.

(3) Whether the court erred in failing to hold that the entire order is void because the Commission misconstrued, departed from and failed to observe the rule and norm of its previous decisions and the controlling statutory standards and criteria of Sections 1(4), 3(1) and (4) and 15(3) and (4), in basing its order:

(a) Upon the premise that the standards and conditions of Section 15(4) (b) [which permit establishment of a proposed route short-hauling ex-

isting routes of other railroads, *only* if "the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation"] are lawfully observed and applied by the Commission's findings here:

1. of a need for "more" adequate and economic service than that offered by Union Pacific routes, and

2. that the Rio Grande route is "necessary and desirable" to provide "adequate and more economic transportation",

without any finding by the Commission that the Rio Grande route is "needed" or that it will provide "more efficient" transportation than Union Pacific routes for the involved through traffic between the same origins and the same ultimate destinations;

(b) Upon the premise that the conditions which permit short-hauling other carriers under Section 15(4)(b) can be met and satisfied by merely substituting the lower joint rates applicable over Union Pacific routes for the higher combination rates via the proposed Rio Grande route;

(c) Upon the premise that, under Section 15(4)(b), service over Union Pacific routes may lawfully be condemned and found "inadequate and less economical" than the Rio Grande route for through traffic because, *at points located on and served only by the Rio Grande*, "the Union Pacific routes and the joint rates that apply over them are not available and higher rates apply";

(d) Upon the premise that the Commission may invoke its power under Section 15(3) and (4)(b) for the purpose of making additional transit privileges available by equalizing rates via the Rio Grande with rates applicable over Union Pacific routes;

(e) Upon the criteria that the marketing system for food articles of a perishable nature requires "as wide a distribution as possible", "as many routes as possible", "as much flexibility as possible" and "as many markets and outlets as possible", although Section 1(4) and the prevailing rule of the Commission's prior decisions require carriers to establish only "reasonable" through routes;

(f) Upon the inconsistent criteria that:

1. food articles of a perishable nature must move to markets "with expedition and care" and "without unnecessary interruptions";

2. the longer Rio Grande route is necessary to permit the through transportation of such articles to be interrupted so that the articles may be held as long as 12 months at points on the Rio Grande for "commercial operations" called transit privileges, and

3. ordinary livestock to stop for grazing or feeding, and marble and granite monuments to stop for partial unloading at points on the Rio Grande fall within the category of perishable food articles found by the Commission to require expeditious, careful and uninterrupted transportation;

(g) Upon the premise that the Commission may lawfully invoke its powers under Section 15(3) and (4) to obtain the remedy it desires for rates found violative of Sections 1 and 3, and that findings of violations of the latter sections afford a lawful basis for ordering the through routes and joint rates.

(4) Whether the Commission may require Union Pacific routes to short haul themselves by establishing through routes and joint rates with the Rio Grande for the sole purpose of permitting through traffic to be stopped at points on the Rio Grande, not served by the

Union Pacific, for "commercial operations" (known as transit privileges), such as storing, processing and cattle grazing, at the same rates the same shippers have when using Union Pacific routes between the same points of origin and the same ultimate destinations.

(5) Whether the court's finding that transportation service via the *proposed* Rio Grande route is "inadequate and also inefficient and uneconomical" for through shipments requiring transit at points on the Rio Grande and re-shipment to final destinations beyond its termini, affords a lawful basis for the order short-hauling Union Pacific routes under Section 15(4)(b), which permits short-hauling other railroads only if "the Commission finds that the through route *proposed* to be established is needed in order to provide adequate, and more efficient or more economic, transportation."

(6) Whether the court erred in failing to review and consider the whole record of evidence and all the issues tendered by the pleadings and arguments of the parties, and in failing to hold that the order is entirely null and void, because:

(a) The order is based upon erroneous interpretations of law, and there is no rational basis or support for the order or any part of it, in the evidence or in the findings made by the Commission;

(b) The Commission *did not make*, and the evidence does not justify or support, findings essential to the validity of the order, among others:

1. that Union Pacific routes are inadequate, inefficient and uneconomic for movement of the involved traffic,

2. that the Rio Grande route is "needed", and that it will provide "more efficient" trans-

portation service than Union Pacific routes (Section 15(4)(b)),

3. that diverting traffic and revenues from Union Pacific routes to the Rio Grande would serve such beneficial purpose as maintaining good service or improving it,

4. that the Rio Grande is efficiently operated, furnishes satisfactory service or has surplus capacity or ability to haul any additional volume of traffic,

5. that diverting the traffic to the Rio Grande's longer route will speed up its movement,

6. that the Rio Grande will generate new or additional traffic or contribute additional transportation facilities in the northwest area, or that existing routes are insufficient or incapable of moving the traffic to and from that area,

7. that by including the Rio Grande route shippers to and from the northwest area will have lower rates than they have via Union Pacific routes,

8. that the overall transportation system or shippers using it would benefit by including the longer Rio Grande line in present routes for a "bridge" haul over its line,

9. that shippers have ever made complaint against service rendered by Union Pacific routes for the traffic involved, or demanded that the Rio Grande be included in present through routes;

(c) The evidence does not support or justify the Commission's findings—

1. that the combination of local rates via the Rio Grande are unjust and unreasonable,

2. that the joint rates which now apply over Union Pacific's shorter and more direct

routes are reasonable for application via the longer and more onerous Rio Grande route,

3. that the combination rates via the Rio Grande are unduly prejudicial of shippers and receivers using or desiring to use the Rio Grande route or unduly preferential of shippers and receivers using the Union Pacific routes,

4. that the Union Pacific and other railroads discriminate against the Rio Grande in violation of Section 3(4) in maintaining through routes with the Bamberger Railroad at points on its line between Ogden and Salt Lake City, while refusing to make like joint rates with the Rio Grande at the same points,

5. that through routes and joint rates with the Rio Grande are "necessary and desirable" in the public interest to provide "adequate and more economic transportation",

6. that shippers in the northwest producing area (who testified that they sell their products in all markets in all the 48 states and 5 foreign countries) "are debarred from effective participation" in the marketing system, because they must pay higher rates if they ship through traffic via the Rio Grande than the joint rates available to them via Union Pacific routes for the same through traffic moving between the same origins and the same destinations;

(d) The Commission arbitrarily refused to give effect to the requirement in Section 15(4) that reasonable preference be given the originating carriers;

(e) The Commission refused to consider or give effect to the National Transportation Policy and to the evidence showing that diversion to the Rio Grande of any substantial part of the traffic would result in wasteful transportation and economic

waste and in serious detriment to Union Pacific service and its employees, to certain other railroads and their employees and would inflict serious economic injury to numerous communities and the public served by Union Pacific routes;

(f) The Commission arbitrarily commingled and misused its authority under, and the remedies for violations of the separate and independent provisions of Sections 1(4), 3(1) and (4) and Section 15(3) and (4), and its order is vague, uncertain, indefinite and conflicting in its requirements;

(g) Upon its findings that the Rio Grande had not sustained its complaint, the Commission acted arbitrarily and contrary to law in failing to dismiss the complaint and in ordering through routes and joint rates on the theory that because shippers had intervened and testified, the Rio Grande's complaint became a shipper complaint;

(h) The Commission acted arbitrarily and unlawfully in refusing to dismiss the entire proceeding on the ground that it was vitiated and nullified by the fact that shipper witnesses on whose testimony the order is based were admittedly solicited and procured by the Rio Grande for the purpose of helping it win its case.

POSITION AND INTERESTS OF THESE FIVE APPELLANT STATES

These five States were moved to intervene in the proceeding before the Commission and the court because of the overwhelming detriment the shippers and general public of such States would suffer as a result of the diversion of traffic away from the Union Pacific proposed by the Rio Grande. Any such diversion of traffic would immediately affect the service of the Union Pacific to ship-

pers and would also inflict very serious consequences upon employees of the Union Pacific that are now engaged in the handling of such traffic in these five States. Moreover, such diversion, as shown by testimony reviewed hereafter, would greatly impair the capacity of the Union Pacific to continue to provide at lowest cost the transportation service so essential in all this territory.

It was made indisputably clear by these States that in their area there is no substantial need for the new routes and joint rates proposed by Rio Grande and that the granting of proposed relief to this local mountain railroad of Colorado and Utah would adversely affect the economy of all these intervening States.

These five States, representing territory[4] served by long established Union Pacific routes between the Missouri River and the Pacific northwest, oppose Rio Grande proposals to short haul the shortest, swiftest and most economical route to eastern and southern markets, by requiring Union Pacific and over two hundred other railroads to enter into joint through rates with the Rio Grande whose admitted objective is to divert this traffic, primarily from the Union Pacific, in order to obtain a "bridge" haul and thereby improve its financial position. According to Rio Grande the "potential" volume of such traffic moving from the northwest to the east and south, which would be "available for solicitation", amounts to 101,476 carloads annually.[5]

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4 The area of the five States approximates 500,000 square miles, or about one-sixth of the total area of the United States. The population of the five States represented by these appellants is nearly seven million people.

5 As indicated by the Commission (R. 45) the bulk of the traffic sought constitutes agricultural and mineral products of the north-

(Continued on next page)

Being distant from the principal markets, the economic life of the northwest depends upon fast, efficient, low cost transportation. Present transportation facilities and routes to and from this area are more than sufficient and Union Pacific alone is shown to possess an unused transportation capacity of 85%. Piling on additional surplus facilities and unneeded routes will, in the opinion of these States, adversely affect the economic future of this territory and violate the manifest policy and intention of Congress."

The present through route provisions of the Act were adopted in 1940 in order to make the "shortest, quickest, and cheapest routes available."[7] Union Pacific routes meet these tests. Rio Grande routes do not.

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west, which (R. 87) now travel via Union Pacific "because the Union Pacific routes are shorter." The reverse movement west comprises only 56,286 carloads annually and was given little emphasis by Rio Grande. The only westbound articles included in the order were granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the northwest (R. 22).

The traffic east and the traffic west are entirely independent of each other and should have been so considered. The Commission's order which the Court annulled in *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, 273, involved only the establishment of "through routes for westbound freight traffic."

6 Congressional policy since 1920 has stressed as paramount economy and efficiency in transportation facilities. *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277. The 1940 declaration of Congress (49 U. S. C. preceding § 1) emphasizes "adequate, economical and efficient service" and this declaration controls the "basic power of the Commission," *American Trucking Assns. v. U. S.*, 344 U. S. 298.

7 In its report No. 404, April 22, 1937, on Senate Bill 1261, 75th Congress, 1st Session, the Senate Committee on Interstate Commerce said at page 2:

"Your committee feels that the shippers of the country should be given the right to use the *shortest, quickest, and cheapest routes*

(Continued on next page)

STATEMENT

About 172,000 carloads of traffic originate and terminate annually on the lines of the Union Pacific, Great Northern, Northern Pacific, Milwaukee, Southern Pacific and other railroads that have owned and operated for some 75 years thousands of miles of trackage in the ("northwest") area embracing northern Utah, Idaho, Montana, Oregon and Washington. Most of that traffic originates and terminates on the lines of the Union Pacific[8] and moves over its lines through Idaho, Wyoming, Nebraska and Kansas between points in the northwest area and points in the eastern and southern part of the United States over through routes ("Union Pacific routes") and under joint rates maintained by the Union Pacific and other railroads, including those named above. The joint rates have never applied via the Rio Grande except during a short period in the early part of this century, when Union Pacific and two of its subsidiary lines were in receiverships. Having their own shorter

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available * * *. The bill does not give the Commission power to order the railroads to route shipments in any particular way, but merely provides that *if a shorter route exists*, and if it is in the public interest for the shippers to have this route available, the railroads shall, upon the Commission's order, publish the route and rate in their tariffs. It is not the intention of the committee to interfere with the right of the trunk lines to their long haul, except where this right conflicts with the shippers' right to the *shortest route and lowest rate.* If there is this conflict, the *shipper is merely given the opportunity, if he wishes, of using the shorter or cheaper route.*" (Italics added.)

8 Union Pacific now owns and operates 5,606.7 miles of railroad in that area, of which 2,913.19 miles, or over 50 per cent, consist of numerous branch lines extending from and serving as "feeders" to its main lines. About 50 per cent of the traffic the Rio Grande wants routed via its line originates and terminates on these branch lines. The Rio Grande demands, and the effect of the order is that, all these main and branch lines serve as "feeders" of bridge traffic to its line.

and direct routes connecting at their eastern termini with other railroads forming the through routes for this transcontinental traffic, the Union Pacific and other carriers serving the northwest area have insisted in retaining their long hauls and therefore have refused to establish through routes and joint rates with the Rio Grande for this transcontinental traffic. The only rates applicable via the Rio Grande for this traffic are the combination or the sum of the local rates of each carrier, and those rates are higher than the joint rates over Union Pacific routes.

Since 1935, the Rio Grande management has sought some method by which it could compel carriers comprising the Union Pacific routes to make their joint rates applicable via its longer and more onerous, mountainous route for a "bridge haul" on traffic from and to the northwest area (V. 1, 48). On August 1, 1949, the Rio Grande filed its complaint with the Commission which resulted in the order involved in these appeals. The complaint alleged that the combination of local rates via the Rio Grande for the involved traffic are so much higher than the joint rates maintained via Union Pacific routes as to prevent the movement of the involved traffic via the Rio Grande, thus depriving the Rio Grande of through freight traffic it might obtain if "equal rates" applied via its line. It alleged that the combination rates were unjust and unreasonable, unduly prejudicial to shippers desiring to use the Rio Grande and that the refusal of the Union Pacific and other defendants named in the complaint to establish joint rates in connection with the Rio Grande the same as the joint rates maintained over Union Pacific routes violated Sections 1(4), 3, 15(1) and 15(3) of the Interstate Commerce Act.

Upon filing its complaint, the Rio Grande conducted a vigorous publicity campaign among shippers in the

northwest area and along its own line, condemning the Union Pacific and soliciting and procuring shippers and their organizations to intervene in support of its complaint and testify in such manner as to help it win its case. It succeeded in procuring about 50 of such shippers to intervene and testify, assuring them that by doing so they had nothing to lose but instead they, as well as the Rio Grande, would profit and benefit by an order from the Commission requiring the joint rates demanded by its complaint.

The Rio Grande demanded that the Commission order the Union Pacific and other defendants named in the complaint to establish joint rates on all commodities in connection with the Rio Grande "the same" as the lower joint rates maintained over Union Pacific routes. Realizing that its demands would short-haul the Union Pacific routes 925 miles, Rio Grande's complaint alleged that, as its tracks physically connect with other railroads, through routes "now exist" for the interchange of the involved traffic between its line and the Union Pacific and other railroads and contended that the Commission should prescribe the joint rates without regard to the prohibition in Section 15(4) against short-hauling existing routes. Citing this Court's decision in *Thompson v. United States*, 343 U. S. 549, the Commission rejected that contention and held that prescription of the joint rates demanded by Rio Grande would involve the authority conferred by Section 15(3) as limited by Section 15(4) to prescribe through routes and joint rates.

The Commission found that because of dissimilarities in transportation conditions including the fact that the Rio Grande has "more onerous" operating conditions than any other western line, and that routes via its line would be substantially longer than Union Pacific routes,

the evidence did not prove discrimination against the Rio Grande (except at points on the Bamberger Railroad between Ogden and Salt Lake City). But for the commodities named in the order it found the combination rates via the Rio Grande were unjust and unreasonable and unduly prejudicial to shippers desiring to use that line and unduly preferential to shippers using Union Pacific routes to the extent that the combination rates via the Rio Grande "exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes".

Instead of exerting its direct powers to remedy the violations so found (of Sections 1(4), 3(1) and 3(4) of the Act) the Commission invoked its power under Section 15(3) and 15(4) to order through routes and joint rates, saying that its action here was grounded on the exception to the short haul prohibition in Section 15(4)(b) which permits the Commission to order a new through route short-hauling existing routes if "the Commission finds that the through route, *proposed* to be established is needed in order to provide adequate, and more efficient or more economic, transportation." Purporting to act under that clause, the Commission said a question of "more" adequate transportation was presented as to certain commodities of a perishable nature. It found Union Pacific routes "inadequate" for the novel and untenable reason that they are not available at points located exclusively on the Rio Grande and that the *proposed* Rio Grande route "is necessary and desirable in the public interest, in order to provide adequate and more economic transportation" for the commodities named in the order. It did not find the Rio Grande route was "needed" nor that it would provide "more efficient" or cheaper transportation than that provided by Union Pacific routes.

The order (R. 21) requires the Union Pacific and over 200 other railroads to cease and desist from publishing rates for the articles named in the order in connection with the Rio Grande higher than the rates maintained over Union Pacific routes and from practicing the undue prejudice and preference and unlawful discrimination found in the report. The order further requires the defendants named in the Rio Grande's complaint to establish and maintain "rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination" found in the report. However, neither the report nor the order indicates whether establishment of the rates required will remove the undue prejudice, preference and unlawful discrimination so found, or whether some other and different rates would be necessary to accomplish that result.

In an apparent attempt to justify the use of its through route and joint rates powers the Commission departed from the standards of Section 15(4)(b) which it had expressly invoked, and from the criterion or measure of a railroad's duty under the Act, Section 1(4), which makes it the duty of railroads only "to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto." The report asserts that the present complex and far-flung marketing system for perishable food articles requires that they be moved to market "with expedition and care", and "over as many routes as possible", with "as much flexibility as possible" and without "unnecessary interruptions" (R. 70), to "as many markets and outlets as possible" (R. 56). Thus, the Commission invents a new standard or criterion of as many through routes "as possible" and substitutes that standard for those prescribed by the Act.

The majority of the district court (Circuit Judge Johnsen dissenting on the ground that the order was entirely void because it was based on standards and criteria beyond warrant of the Act) held that there was no evidential or legal basis for the Commission's finding that the combination rates via the Rio Grande are unduly prejudicial or preferential in violation of Section 3(1), and no evidence to support the Commission's finding that the Union Pacific routes are "inadequate and less economical than are the Rio Grande routes", except for shipments actually stopped at points on the Rio Grande (not served by Union Pacific) for certain commercial operations known as "transit privileges", such as grazing cattle, freezing, processing and storing and later reshipment of the articles named in the order to destinations beyond the termini of the Rio Grande. For the latter shipments the court sustained the validity of the order but enjoined and set it aside as to all shipments *not* requiring stoppage for in-transit privileges at points on the Rio Grande.

The Commission held that it could not order through routes and joint rates via the Rio Grande without first finding that the Union Pacific routes were "inadequate" and the court agreed with that view (R. 69, 160).

The Commission condemned Union Pacific routes as "inadequate" on the wholly erroneous ground that they offer lower rates and are not available at points served exclusively by the Rio Grande.

But the majority of the court adopted still another erroneous basis for condemning Union Pacific routes, to the extent it sustained the validity of the order, i. e. that transportation service for shipments of the involved

traffic requiring in-transit privileges *at points on the Rio Grande* was "inadequate and also inefficient and uneconomical" (R. 166), and that for such shipments the through routes and reduced joint rates required by the order were needed to provide adequate and more economic transportation via the Rio Grande.

The majority of the court holds that the absence of transit privileges at points on the Rio Grande justifies the Commission in short-hauling Union Pacific routes by invoking its through routes and joint rates powers and the court further holds that the use of the through routes power is justified as a means of remedying unreasonable rates and unjust discrimination against the Rio Grande at points on the Bamberger Railroad between Ogden and Salt Lake City (R. 167, 168).

SUMMARY OF ARGUMENT

1. This case involves a unique proposal that Rio Grande, with routes from 200 miles to 50 per cent longer than Union Pacific routes, be permitted to short haul the shortest, fastest, most efficient and most economic routes from the Pacific northwest to the eastern markets. The affirmative findings of the Commission as to Union Pacific facilities, service and capacity preclude any jurisdictional conclusion that the proposed route is "needed in order to provide adequate, and more efficient or more economic transportation". Since the undisputed evidence shows Union Pacific routes are "adequate" for the through movement of the involved traffic, there was no occasion to consider the Rio Grande's proposal to establish additional routes via its line.

The majority opinion of the district court concludes that only as to shipments requiring transit on the Rio

Grande is there any basis for a claim of inadequacy. As pointed out hereafter a finding of inadequacy of Union Pacific routes cannot be based on the higher rates charged by Rio Grande in connection with its transit privileges.

Rio Grande, in instituting this action, made no claim that Union Pacific routes are not adequate and has not questioned the economy and efficiency of Union Pacific routes. The Commission findings reflect some of the inefficiency of the mountainous Rio Grande route, but do not portray the full extent of the wastefulness involved in the longer, slower and more circuitous route of the Rio Grande.

The evidence of these five States demonstrates conclusively that the proposed routes are not "needed" and that serious public detriment will be sustained by their establishment. This showing as to "public interest" was given no weight by the Commission.

The shipper testimony, solicited by Rio Grande, is without probative force and is clearly contrary to the overwhelming preponderance of the evidence. Under any reasonable interpretation of statutory requirements the evidential basis or which the order rests is insufficient.

Our contentions are supported by the legislative history of 1940 amendments which demonstrate the intent of Congress to strengthen restrictions on short-hauling, and make it possible for the Commission to establish "shorter" instead of "longer" routes.

2. To construe the statutory provisions as permitting establishment of through routes solely to afford shippers using Rio Grande lower rates in connection with existing transit privileges, will, as held by Circuit Judge

Johnsen in his dissent, make it possible for the Commission to create new routes "from every connecting point in the country against every existing carrier". Transit being a "commercial operation", as held herein by the Commission, and not being a transportation service, the Act cannot be by-passed by sustaining the order on the basis of transit rates. The Commission's authority to deal with transit privileges is wholly independent of its through route and joint rate powers. The decisions uniformly hold that transit is local in character and subject to control by the carrier serving the shipper.

The criteria under which the Commission established through routes here do not conform to the statute. The Act does not authorize as many new routes "as possible" to reach as many new markets and provide as much flexibility "as possible"; and as pointed out below by Judge Johnsen, any such standards would completely destroy the short-haul prohibition in Section 15(4) of the Act.

The Commission failed to find that the proposed route is "needed" or will provide "more efficient" transportation as required by clause "(b)" of Section 15(4) which it expressly invoked. In addition, the Commission distorted the statutory requirement of "adequacy" by a mere finding that addition of the proposed route would make transportation "more adequate".

The Commission's report contains many inconsistent and conflicting findings and even fails to follow and apply the standards and criteria it adopted as the legal basis of its order.

The Commission having invoked the standards of clause "(b)" of Section 15(4) as the basis for its action,

the order must stand or fall under those standards and cannot be sustained at this time under any other standard or provision of the Act. This rule, clearly established by the decisions of this Court, is essential to prevent judicial exercise of "administrative" functions. The effort of Rio Grande and the Government to sustain the order under other provisions of the Act must therefore fail.

The evidence shows that this is a "financial needs" case within the prohibition of Section 15(4) of the Act and for that reason alone the Commission should have dismissed the complaint. Rio Grande could have no other purpose than financial gain in becoming a "bridge"-carrier in the proposed route. Reducing the scope of the Commission's order, as the court below did, does not change the financial gain character of the case.

The Commission's order entirely disregards the requirements of National Transportation Policy established by Congress and this failure, standing alone, invalidates the order under recent decisions of this and other federal courts.

3. The evidence will not support a finding of any violations of the Act by Union Pacific. Moreover, as held by this Court in *Thompson v. United States*, 343 U. S. 549, 560, and other cases, none of the claimed violations of the Act may be used to evade the through route requirements of Section 15(4).

There is an entire absence of evidence to sustain the Commission finding that present combination rates via the Union Pacific are unreasonable. The sole support for such finding in this record is a comparison of commodity rates showing that joint rates on the Union Pacific are

lower than combination rates via the Rio Grande. As this Court has often noted, this is always true and proves nothing. If such a showing justifies establishing a new route, then Section 15(4) is completely nullified.

The rate and other provsions of the Act under a long line of decisions of the Commission and this Court are subordinate to the through routes provision and cannot be used to circumvent the latter requirements.

In view of the admitted dissimilarity in transportation conditions, between the Union Pacific and Rio Grande routes, there can be no finding of undue prejudice under Section 3(1) nor of unjust discrimination under Section 3(4). The burden of proof in this regard was upon Rio Grande and the finding by the Commission of no violation under Section 3(4) required a like finding under Section 3(1). In addition, Section 3(1) gives no rights to Rio Grande since this section is applicable only to shippers and receivers of freight. Intervention of some shippers in support of Rio Grande did not remedy this defect since their intervention was ancillary and in subordination to the rights of Rio Grande.

The proviso to Section 3(1), added in 1940, prevents that section from being used to establish discrimination involving the traffic of "any other carrier". The 1940 legislation expanded Section 3(1) so as to prohibit discrimination against any "region, district" or "territory". The legislative history of this proviso shows that it was added when Section 3(1) was expanded to prevent any such expanded Section 3 from being used to override other provisions of the Act including Section 15(3) and (4). Section 3 cannot be utilized as a basis for any claim of discrimination as to transit privileges.

The decisions relied on by Rio Grande fail to sustain any claim of a violation of the Act. *State of New York v. United States*, 331 U. S. 284, involved "interterritorial class rates" and no question of through routes. The proviso to Section 3(1), added in 1940, was not involved or mentioned in the opinion. *Virginian Ry. v. United States*, 272 U. S. 658; involved claims of discrimination by one railroad of 54 shippers on its own line because their rates were higher than rates of 45 other shippers on the same line of railroad.

4. The Commission has commingled and misused independent provisions of the Act to circumvent Section 15(4). As emphasized by Circuit Judge Johnsen below, this has resulted in great "confusion" in the report and constitutes another "attempt by the Commission to gain a new foot hold, under another disguise". Such scrambling of the provisions of the Act has been condemned by this Court in such cases as *Central R. R. Co. v. United States*, 257 U. S. 247. The Commission has direct and definite powers under Sections 1 and 3. These sections cannot be used to circumvent Section 15(4) and the latter cannot be used to provide reasonable rates under Section 1 or to prevent discrimination under Section 3. An amendment to Section 15 in 1910 eliminated language which prior thereto might have permitted that section to be utilized "to give effect to any provision of this act."

ARGUMENT

I.

Since the Undisputed Evidence Shows and the Commission Found That (1) Union Pacific Routes are Shorter, Faster, Efficiently Operated and Have Surplus Capacity to Handle any Foreseeable Volume of Traffic and (2) Rio Grande Routes are Over 200 Miles Longer, Require Additional Interchanges, Involve More Onerous Operating Conditions and Maintain Higher Rates, the Record Will not Support a Jurisdictional Finding That Proposed Rio Grande Routes are "needed in order to provide adequate and more efficient or more economic transportation" as Required by Section 15(4) (b) of the Act.

The Commission report recognized at the beginning that Rio Grande proposals must satisfy Section 15(4)(b)[9] and that it could not order additional routes via the Rio Grande "unless the existing routes can be found not to provide 'adequate' transportation" (R. 69). The majority of the district court agreed that "only in the event there was inadequacy of transportation can the question of efficiency or economy be reached" (R. 160).

Thereafter the report reviews the evidence and makes affirmative findings as to the efficiency and adequacy of Union Pacific facilities which findings are inconsistent with and contradict the conclusions that Union Pacific routes are "inadequate" and that the proposed new

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9 "* * * any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation." (R. 619.)

routes are needed as required by Section 15(4)(b)."[10]

The majority opinion of the district court sustains the Commission's order only as to shipments "which require in-transit privileges at points on the Rio Grande." As to all shipments from the northwest to initial destinations east of Denver and shipments west with initial destinations in the northwest territory, the majority opinion concludes that "[t]ransportation service is now adequate between those points."

In the next section of this brief we point out that no part of the order may be sustained upon the basis of in-transit privileges on the Rio Grande. As suggested by the dissenting opinion of Circuit Judge Johnsen,

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10 The Commission finds that Union Pacific facilities are:
"* * * adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future" (R. 62);
that the Union Pacific:
"* * * has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line" (R. 62);
that:
"* * * through service over defendants' [Union Pacific] routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande * * *" (R. 70);
that:
"Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services" (R. 62);
that, because of physical and geographic facts recited in its report and its longer mileage:
"* * * the Rio Grande line is less favorably situated than that of the Union Pacific" (R. 62);
and that:
"* * * as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein." (R. 70.)

Union Pacific routes, may not be declared inadequate upon such a ground.

The very first inquiry, in applying Section 15(4), as this Court said in *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, is to determine whether there "is adequacy of transportation." Unless Union Pacific routes are "inadequate", and there is no evidence to support such a finding herein, a new through route that short hauls the Union Pacific cannot be established.

Having properly made the basic findings of fact that present Union Pacific routes are adequate, the Commission should have ended its inquiry and dismissed the proceeding altogether, for, where existing routes are "adequate" and not unreasonably long, the Commission is without authority to compel other routes that short haul existing routes. Because the Commission ignored the adequacy of existing routes which it undertook to short haul by requiring others, its orders were annulled in *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, and in *United States v. Mo. Pac. R. Co.*, 278 U. S. 269."[11]

There is no room for dispute in this record that the use of the shorter single line system of the Union Pacific results in more efficient transportation than the use of the proposed Rio Grande route, which involves two more interchanges between carriers, as well as traversing a

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11 The essentiality of a rational and factually sound finding of "inadequacy" of existing routes or service lies in the fact that it is jurisdictional and, therefore, must be made before the Commission can exert the authority to order additional routes or service. *United States v. B. & O. R. Co.*, 293 U. S. 454; *Florida v. United States*, 282 U. S. 194; *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588; *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538; *Hudson Transit Lines v. United States*, 82 F. Supp. 153, 157, aff. 338 U. S. 802.

longer and more difficult terrain. There is no room for dispute that the use of the single line route of the Union Pacific is more efficient and more economic for the same reasons and for the additional reason that it is considerably shorter.

There can be no question that transportation facilities and services in the entire northwest territory are more than adequate. The territory is served not only by the Union Pacific, but also by the Great Northern, the Northern Pacific, the Milwaukee, the Southern Pacific and certain short line railroads as well as by water and motor carrier service.

It is to be noted, in this connection, that in instituting this proceeding before the Commission, the Rio Grande makes no claim whatever that its route is "needed" as required by Section 15(4), or that Union Pacific routes are inadequate. The position and showing of the Rio Grande disregards this section of the Act.

The report of the Commission finds that Union Pacific facilities "are adequate to move over its own direct routes the present volume of traffic and any additional volume that might be anticipated in the foreseeable future"; that it "has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line"; that there is "much greater curvature in the Rio Grande line than in that of the Union Pacific"; that the "total rise and fall in feet on the Rio Grande is 66.3 per cent greater than that of the Union Pacific"; that the "Rio Grande as a bridge line would require at least 24 hours additional time in transit * * * and would require one or two more terminal-yard services" (R. 62); and that from Boise, Idaho, for example, to the territory between

Omaha and Chicago "the Rio Grande routes sought via Ogden are longer generally by at least 33 per cent, and range up to more than 50 per cent, than the short routes" (R. 71).

We submit, however, that the full impact of wastefulness established beyond dispute in the record is not portrayed in the report and order. The proof is overwhelming that the Rio Grande is not merely "less favorably situated" but actually "has no value as a service route" on the proposed bridge traffic (V. I, 603). The curvature on the Rio Grande is so great (I. C. C. Ex. 12, p. 9), that a train completes a circle an average of every 5.45 miles. The process of going up and down and around and around the mountains of Colorado, requires 51% more effort from Ogden to Denver, a distance of 606.9 miles, than a trip on the Union Pacific from Pocatello, Idaho, to Cheyenne, Wyoming, a distance of 551.6 miles (V. I, 574).

A particularly significant fact as to wastefulness is the proof relating to average freight car miles per serviceable freight car day which shows that Union Pacific is from 84% to 94% more efficient (I. C. C. Ex. 15, p. 7). This fact, together with the additional interchanges and other delays involved in getting through the Ogden bottleneck, adds up to a tremendous loss. It is conservatively estimated to amount to at least one full day per car (V. I, 641) or a minimum loss of 207,000 car days annually. This waste is estimated to cost $124.33 per car by Witness Oliver or a total of $19,614,549, annually, upon the basis of the full traffic potential claimed by the Rio Grande to be subject to diversion (I. C. C. Ex. 53, p. 3).

Without in any way attempting to exhaust or review all the record upon this subject, we submit that it must be conceded by everyone that the Rio Grande and Union Pacific are not comparable in any sense. The facts concerning the Rio Grande are well known to the public and have been cited by the Commission many times.[12]

The fact is that in practice the Rio Grande route has not been a serviceable route even in emergencies and, for that reason, traffic was not diverted to it during the last

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12. In *Commercial Club, Salt Lake City v. A., T. & S. F. Ry. Co.*, 19 I. C. C. 218, 221-222, the Commission said:

"The Denver and Rio Grande is situated, for the most part, among the mountains. Its cost of construction was high, and the expense of operation is much greater than that of the Union Pacific. It is the claim of this company that we should determine the reasonableness of these rates with reference to the cost of handling the traffic by its line and with reference to its financial necessities and not with reference to the Union Pacific.

"The Denver & Rio Grande was built for the purpose of handling the local business tributary to its line. No railroad would ever have been built where this one is for the main purpose of handling through business like that under consideration. Today its branch lines aggregate two and one-half times the mileage of its main line, over which this traffic passes. The great bulk of its tonnage today is from local business. Its line is longer than that of the Union Pacific between all points."

In *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I. C. C. 481, (June 30, 1936), two years after the Dotsero cutoff was established, the Commission described the operating conditions over the Rio Grande as follows:

"The operating conditions on the Denver & Rio Grande Western are unusually severe even for Mountain-Pacific territory; because the difficulties encountered are extreme and extensive. We have frequently in the past recognized these conditions and their effect in increasing the costs of operation on this road * * *. Since the hearing, the financial condition of this road has resulted in the filing of a petition in bankruptcy, and on November 18, 1935, trustees of the property were appointed." (pp. 486-487.)

Due to its geographic location and physical characteristics, the Rio Grande has always claimed that it is entitled to higher rates than other carriers and has secured such rates. *Livestock—Western District Rates*, 176 I. C. C. 1, 55-56, 190 I. C. C. 175, 200 I. C. C. 535.

war (V. I, 890). It was not able to handle the traffic tendered to it during the 1949 blizzard emergency (V. I, 684). The truth is that from a public and shipper standpoint the road and its practices are not desirable because, as shown by the record, it has failed to assume its reasonable responsibilities as a carrier (V. I, 665-672).

The matters heretofore reviewed as to the operations of the Rio Grande are of serious concern to these interveners as representatives of the shippers and general public in the affected States. It is apparent that the Rio Grande, as a marginal railroad, has nothing whatever to offer these States. Adding such a road to our transportation system on a wide-open unrestricted routing basis, will inevitably result in serious rate and service problems for our present carriers.

The public service commissions of these five States offered testimony in this case that carefully reflected the present and future transportation needs and problems of the territory of the Union Pacific extending from the Missouri River to Canada and the Pacific Ocean. This showing included evidence by experts on the staff of these commissions, public officials whose responsibility is to know and represent the public interests of these States. These witnesses came to the hearing supported by exhaustive studies and investigations of the needs and interests of their people. Their testimony was supported and confirmed by other witnesses appearing for cities, traffic associations and by individual shippers from such States. Without exception, these witnesses demonstrated that the present transportation facilities in all this territory are more than "adequate", within the meaning of Section 15(4) of the Act, and that any diversion of traffic to the Rio Grande would have the serious effects mentioned earlier in this brief.

As against the relatively few procured witnesses appearing for the Rio Grande with reference to the "public interest" features of this case, the evidence and showing of these interveners were overwhelming.

Who, may we ask, would be in a better position than the highest railroad regulatory officials of these States to judge, from investigation and experience, whether an additional route via the Rio Grande is "needed" by the shippers and public of Washington, Oregon, Montana and the other States? Whose testimony as to the consequences and effects of putting an unneeded route into competition with existing routes, would be better qualified than that of such officials?

The statement by the Commission that it "considered" "all of this evidence", while inserted to bolster the order, provides no legal support whatever.[13]

It is obvious that the Commission gave no weight whatever to the fact that 120 public and shipper witnesses, who ship 136,000 carloads annually to and from the northwest area, testified in opposition to the Rio Grande that the present Union Pacific routes afford highly satisfactory and fully adequate service for the marketing of their products in all states of the Union and elsewhere and that their own experience had disclosed no handicap or disadvantage in the marketing of their products. Against this overwhelming preponderance of testimony,

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13 In *Beaumont, S. L. & W. Ry. v. U. S.*, 282 U. S. 74, 86, Mr. Justice Butler made the following pertinent observation, for the Court, in this connection:

"The general statements in the reports to the effect that the Commission in reaching its conclusions considered all the pertinent evidence add nothing to the prima facie presumption that generally attends determinations of the Commission. Bluefield Co. v. Public Service Commission, 262 U. S. 679, 688-689."

the Commission and its counsel rely upon the testimony of 50 Rio Grande procured shipper witnesses who ship some 28,000 carloads annually of the same products and who admitted that they distribute their products via Union Pacific's existing routes to markets in all 48 States and several foreign countries. (V. I, 240). The order is not only without evidentiary support, but is clearly contrary to the overwhelming preponderance of the evidence.

It has been our position throughout this proceeding that the public interest is dominant and controlling in whatever view is taken of this case and that the Commission has not been given any authority to override or sacrifice the public interest of all of these States in order to provide the Rio Grande with some additional "bridge traffic" revenue.

In *N. Y. Central Securities Co. v. U. S.*, 287 U. S. 12, the phrase "public interest" in the Transportation Act of 1920 was explained in language that encompasses the wording of both Section 15(3) and Section 15(4), and supports our contention that the new routes proposed by the Rio Grande do not conform to the "public interest" requirements of the Act.[14]

[14] "The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities * * *." (287 U. S. 25.)

It would be necessary before granting any part of the Rio Grande's demands for the Commission to find that there is a real "need" for action "in order to provide adequate, and more efficient or more economic, transportation," and that such relief is "consistent with the public interest." The decision in *Pennsylvania R.*

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When the statute uses the term "adequate" in setting up a standard for transportation facilities, it must refer to a reasonable sufficiency of service for the public as a whole. The statute does not contemplate that the "desires" of every last shipper in the northwest territory for additional routes or for as many routes "as possible" must be completely satisfied in order for service to be adequate. *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, 545.

When the statute states that through routes may be required if "needed" to provide "more efficient" or more "economic" transportation, the statute certainly contemplates, as any dictionary will verify, that the *proposed* routes must be highly capable, effective in operation and involve a thrifty utilization of resources.[15] The record here, and the Commission's own findings show that the Rio Grande has none of these attributes.

The importance of requiring the proof specified in Section 15(4) is well stated by this Court in *U. S. v. Great Northern R. Co.*, 343 U. S. 562, where the economic

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Co. v. U. S., 323 U. S. 588 speaks of considering both shippers' and carriers' interests, in connection with the public interest, and striking a "fair balance."

This "balance" might be compared to that involved in abandonment cases. *Colorado v. United States*, 271 U. S. 153, 168.

15 In the case of *Kassebaum v. Nebraska State Railway Commission*, 142 Neb. 645, 7 N. W. 2d 464, the Court considered the purpose of the motor carrier act of Nebraska which specified an intent to "promote adequate, economical and efficient service." It was held (142 Neb. 655) that this language required routing "best suitable to the trip."

consequences of diverting traffic to a financially weak carrier are accurately described.[16]

Thompson v. United States, 343 U. S. 549, 555, 556, 558, 559, makes repeated references to attempts of the Commission to evade and disregard requirements of the statute, and the short-haul restriction of Section 15(4).

The proposed report of the examiner in this case termed the testimony of a few Rio Grande shipper witnesses as "representative", despite the fact that a far greater number of shippers of a much larger volume of traffic opposed the Rio Grande. The Rio Grande seized upon this idea in an attempt to magnify the weight and scope of its evidence so as to comply with the substantial evidence rule. But its testimony was not offered or submitted to the Commission as either "typical" or "representative." It was all the Rio Grande was able to procure from shippers, and a far greater number of shippers contradicted the meager offerings of the Rio Grande's shippers.

Those few witnesses procured by Rio Grande, in view of the record, are neither "representative" nor

16 "It is one form of regulation to redistribute revenues between connecting carriers by determining divisions of revenues received on existing through routes. The economic ramifications are quite different if the Commission establishes through routes which divert traffic to the lines of a financially weak carrier. Such action not only serves to assist that carrier financially but can also, at the same time, cause important changes in the movement of traffic, diverting traffic to a new geographic area at the expense of other carriers and other areas. Congress amended section 15(4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs. But the provisions of section 15(4)—the restrictions against short-hauling, the financial needs prohibition and the emergency route provision—all deal with the Commission's power to establish through routes." (343 U. S. 574-575.)

"typical." In their insistence upon "wide open" routing, they are "exceptional" rather than "representative."

The theory that the testimony of a few procured shippers from this vast area may be multiplied in weight and effect by a so-called "typical" evidence rule is equally untenable as a matter of law. Reliance is placed by Rio Grande in this connection on decisions of this Court under Section 13 of the Act, and in rate division cases. We submit that even if such a rule is proper in such cases, the present situation is not comparable and no such rule can be invoked here. To say that a railroad, in the present proceeding, could establish rights by procuring a few shipper witnesses and then magnifying their testimony into a "typical" showing, is not consistent with ordinary principles of justice.

Legislative History of 1940 Amendments Shows That Congress Strengthened Restrictions on Short-Hauling and Made Provision for Establishing Shorter and More Economical Routes.

The Commission recognized that the amendments of 1940 (now Section 15(4)) strengthened restrictions on short-hauling but failed to give effect to additional limitations on its authority.[17] There is nothing in the legis-

17 The Commission report at page 655 contrasts two cases under earlier statutes, saying:

"Since the two decisions last above referred to, section 15(4) has been amended (in 1940), so that now the prohibition against short-hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the through route proposed to be established is needed in order to provide adequate and more efficient or more economic transportation."

lative history[18] of these amendments to suggest that Congress intended to approve such wasteful and inefficient proposals as those of the Rio Grande in this case.

The discussion of Senator Wheeler, Chairman of the Committee on Interstate Commerce, when the 1940 amendments to the Act were under consideration in Congress, demonstrates that the objective was to permit the Commission to establish shorter and more economical routes. Under prior law this Court had held in *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, that a route 308 miles long could not be established to short haul one 311 miles which already existed. At page 6054 of the Congressional Record May 20, 1939, Senator Wheeler said of the amendment:

> "It leaves the option of routing with the shipper but under the authority now given the Interstate Commerce Commission it cannot establish a route over the shorter way."

He goes on (p. 6058) to point out that the amendment would abolish any "vested right" in the longer route.[19] In the instant case, the "vested right" is claimed

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18 Consideration of legislative history in this case is appropriate. *Helvering v. Morgan's, Inc.*, 293 U. S. 121.

19 In its report No. 404, on Senate Bill 1261, 75th Congress, 1st Session, the Senate Committee on Interstate Commerce said at page 2:

"Your committee feels that the shippers of the country should be given the right to use the *shortest, quickest, and cheapest routes available* * * *. The bill does not give the Commission power to order the railroads to route shipments in any particular way, but merely provides that *if a shorter route exists*, and if it is in the public interest for the shippers to have this route available, the railroads shall, upon the Commission's order, publish the route and rate in their tariffs. It is not the intention of the committee to interfere with the right of the trunk lines to their long haul, except where this right conflicts with the shippers' right to the *shortest route and lowest rate*. If there is this conflict, the *shipper is merely given the opportunity, if he wishes, of using the shorter or cheaper route.*" (Italics added.)

by the longer Rio Grande to short haul the shorter Union Pacific routes.

It is worthy of note in connection with this legislative history that the American Short Line Railroad Association (intervener in support of the Rio Grande in this litigation) stressed that the *Missouri Pacific* decision prevented the establishment of shorter and more efficient routes and that it was in the public interest to effect such economies.

The history of this legislation contradicts any suggestion that it involved delegation of authority to provide wide-open routing or longer and wasteful routes. It is true that some interests have long espoused unrestricted routing but there was no move following the 1940 amendments to place any such interpretation on the new legislation. Recent decisions of the Commission summarized in *Adrian Grain Co. v. Ann Arbor R. Co.*, 276 I. C. C. 331, emphasize the purpose of avoiding wasteful and uneconomic transportation in authorizing short-hauling routes.[20]

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20 These Commission decisions, in cases since 1940, are reviewed (276 I. C. C. 331) at page 333 as follows:

"Section 15(4) of the act has been in its present form since September 18, 1940. In several proceedings since then, reasonable through routes which short-haul one or more carriers have been prescribed. See D. A. Stickell & Sons, Inc., v. Alton R. Co., 255 I. C. C. 333 (sustained in Pennsylvania R. Co. v. United States, 323 U. S. 588); Allied Mills, Inc., of Virginia v. Alton R. Co. 272 I. C. C. 49; California Milling Corp. v. Atchison, T. & S. F. Ry. Co., 269 I. C. C. 725 and 274 I. C. C. 120. In the first two of those proceedings it appeared that the routes required to be establishd *eliminated expensive out-of-line hauls*, and in the latter proceeding the *routes required were shown to be shorter in many instances* than those which had existed. *In all of those proceedings the routes required were at least as economical, from the standpoint of the carriers* as well as of the shippers as were most of the existing routes.

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Instead of approving wide-open routing, therefore, the 1940 amendments strengthened the restrictions against short-hauling and gave the Commission power to establish shorter and more efficient routes. The Commission's order here, requiring longer and more onerous routes via the Rio Grande reverses the purpose of those amendments.

II.

The Commission Failed to Give Effect to Controlling Statutory Prohibitions, Standards and Criteria and Failed to Apply the Rule and Norm of its Previous Decisions; and the Court Erred in Sustaining a Part of the Commission's Order on the Erroneous Premise That Through Routes and Joint Rates may be Established for the sole Purpose of Making Additional Transit Privileges Available by Equalizing Rates.

In the several subdivisions which follow we discuss the various "statutory standards" which have been disregarded, violated or side-stepped by the Commission in this case. In so doing we approach the matter in accordance with the declaration of this Court that where Congress has prescribed the standards pursuant to which "rights are to be determined", the "precise grounds" of the Commission's a tion are to be scrutinized in order to effect a "judicial review"; and such examination includes ascertainment of whether any "erroneous statutory construction lies hidden in vague findings".[21]

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"The instant situation differs. All of the routes *sought are substantially longer than the present routes, and their establishment would appear to encourage wasteful and uneconomic* transportation. In addition, because of the circumstances here present, we believe a requirement that the *routes sought to be established would not 'give reasonable preference' to the originating carrier.*" (Italics added.)

21 *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 488-489.

We shall also review in this section a number of instances where this Court refused to sustain orders because the Commission "has not adequately explained its departure from prior norms and has not "sufficiently spelled out the legal basis of its decision".[22]

A. Through Routes and Joint Rates Cannot be Established for the Purpose of Making Additional Transit Privileges Available by Equalizing Rates.

The majority opinion of the court below mistakenly assumes that there is an "absence of in-transit privileges" on the Rio Grande. The record, however, shows clearly that shippers on the Rio Grande have "intransit privileges". The sole complaint of the Rio Grande is that the rates to which such privileges apply are too high (R. 28). In establishing the through routes and joint rates requested the Commission has lowered the transportation rates and transit costs of shippers pretending a desire to use the Rio Grande's longer and more onerous route.

That portion of the Commission's order upheld by a majority of the district court is sustained solely on the proposition that the claimed absence of "intransit" privileges may be considered in determining whether present routes are "inadequate" under Section 15(4).[23]

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22 *Sec'y of Agriculture v. United States*, 347 U. S. 645, 653; *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 87, 94-95; *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504-505, 510-511; *Atchison Ry. v. United States*, 295 U. S. 193, 201-202.

23 "We are confronted only with determining whether a finding of inadequacy of transportation may be legally based upon the absence or lack of services which are incidents of and to in-transit privileges. If that be true, the Commission may order the establishment of through routes and joint rates, with their ordinary incidents—in-transit privileges—when such action is necessary in order to provide adequate transportation. We are convinced that the Commission does have that power. *Pennsylvania R. Co., et al., v. United States, et al.*, 323 U. S. 588, 54 F. Supp. 381."

The dissenting opinion of Judge Johnsen sharply points out that if new routes can be established "in part" to provide additional transit privileges there is no practical limit or restriction on the establishment of new routes by the Commission (R. 173).[24]

The Commission suggested in its report that its "conclusion is also supported" by the "situation with respect to the operation of many of the in-transit privileges and services" (R. 70), but its "conclusons" and findings make no reference to transit. Paragraph 4 of its "conclusions" states that "except as indicated in the preceding findings, the allegations made in the complaint are not sustained" (R. 74).

A Transit Privilege is a "Commercial Operation" not Transportation Within the Meaning of Section 1(3) of the Act.

The statement by the Commission that "transit" constitutes "commercial operations" (R. 48) reflects a conclusion, inescapable from the language in paragraph 3 of Section 1 of the Act, that a "transit privilege" does not constitute transportation which must be furnished by a railroad. This Court approved such conclusion, *B. & O. R. Co. v. U. S.*, 305 U. S. 507, 525. The pertinent language of that paragraph has remained the same since 1906 (34 Stat. 584). Transportation under the Act is defined to include "services in connection with the * * *

24 "If the order is upheld either in whole or in part, on the basis on which the Commission's result has been reached, the Commission can hereafter exercise its power to require through routes and joint rates from every connecting point in the country against every existing carrier, since every new through route necessarily will afford additional transit privileges and every joint rate necessarily will reduce the cost of using the new through route as against the combination rate previously applicable."

transfer in transit * * * of property transported." It is the "transfer" of commodities "in transit" that is declared to be transportation, by this language, and not "commercial operations."[25]

In 1914, after the foregoing language had been in the statute eight years, the Commission said in *The Five Per Cent Case*, 31 I. C. C. 351, 408, that—

> * * * a transit privilege is something offered to the shipper in addition to the transportation service. * * *"

Citing and following several decisions of this Court, *Walling v. Baltimore Steam Packet Co.* (C. A. 4), 144 F. 2d 130, in an opinion by Circuit Judge Parker, declares at page 134 that the phrase "services in connection with" has "uniformly been construed to mean service rendered while a shipment is in the custody and control of the carrier or service which the carrier is legally obligated to perform."

Transportation in the "ordinary sense", as stated in *Cunard S. S. Co. v. Mellon*, 262 U. S. 100, 122, "comprehends any real carrying about or from one place to another."

It is of course presumed that the "ordinary acceptation" of these terms was intended by the Congress.

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25 Indeed, an "in-transit privilege" is the very opposite of "transit". It is a privilege granted shippers to interrupt the actual transit or movement of their shipments and hold them in their own custody at the point of interruption for periods as long as 12 months for performing such "commercial operations" as grazing cattle, milling grain into flour, storing, etc., and later reshipped to final destination on the through rate as if there had been no interruption to the continuous through transportation movement. This has been called "the fiction of a through rate with transit privilege". *A. T. & S. F. Ry. v. United States*, 279 U. S. 768, 777.

Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, 474. Moreover, it is a rule of construction applicable to "business of a public nature" that the "language of such regulations will not be broadened by implication." *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U. S. 238, 248.

Our position is not based, as suggested by the majority opinion of the lower court, on the ground that the Commission has "no control" over transit in any situation and that the granting of transit is "subject only to managerial discretion." It is simply our position that transit does not constitute transportation within the meaning of the Act and being a "commercial operation" any control that may exist with reference to it may not be used as a basis for ordering through routes and joint rates under Section 15(4). That position is supported by language in *Great Northern Ry. Co. v. United States*, 81 F. Supp. 921,[26] affirmed *per curiam* 336 U. S. 933.

It must be remembered that the secondary meaning of the term "transit" as the "privilege of stopping over goods in course of carriage"; constitutes "almost the reverse of its primary significance."[27]

The position of the Commission heretofore has been that whatever control it may exercise over transit stems

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[26] The question in that case was whether the Commission's order established a new through route. At page 925 and with reference to transit the opinion said:

"We think that a transit is an accompaniment or supplementary advantage in connection with an existing through route but does not, in itself, create the through route. The existence of a transit implies the existence of the through route. A transit at a particular point is the voluntary or required action of the particular carrier at such point, but a through route is not created by creating a transit."

[27] *Koshland v. Columbia Ins. Co.*, 237 Mass. 467, 130 N. E. 41, 43.

from the 1906 amendment to what is now Section 15(1) of the Act relating to practices.[28] As discussed elsewhere in this brief, Section 15(1) is an independent portion of the Act and contains no authority to override other provisions of the Act such as Section 15(4).

The only authority cited by the majority opinion of the court to support its position that the situation as to transit privileges sustains part of the order is *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588. The opinion of this Court as well as the Commission's report (255 I. C. C. 333) in that case shows that the shipper involved already had ample transit privileges and was located on the Pennsylvania railroad, against which complaint was made, and not, as here, on some other railroad. The facts in the *Pennsylvania* case eliminate it as a precedent for the present case.[29]

The majority opinion of the district court makes a drastic departure from the rule followed by the Commission in previous cases regarding its jurisdiction over transit privileges. Following decisions of this Court, the Commission has repeatedly held that there can be no discrimination levelled at a carrier because some other car-

28. *Spiegle v. S. Ry. Co.*, 25 I. C. C. 71.

29. The through routes required in that case eliminated four extra days' time in transit, a 149-mile out-of-line haul costing 90 cents per ton and two switching interchanges, in contrast with a completely reverse set of facts in the instant case, where the longer Rio Grande route required by the Commission's order would result in some 200 miles of additional transportation over the most "onerous" operating conditions of any western railroad, adding $124 per car to transportation cost, two additional interchanges between carriers at an additional cost of $20.44 per car per interchange, and at least one or two days' more time in transit, and would short-haul existing routes at least 925 miles and would deprive some of the appellant railroads of their entire hauls.

rier with which it connects fails to grant equal transit privileges. These former decisions all recognize that transit is local in character and subject to control through the carrier which serves the shipper.[30]

The rule that "transit privileges are treated as a matter local to the railroad on which the transit point is situated", is well settled.[31] No reason is shown in the

30 In *Federal Products Co. v. I. C. R. R. Co.*, 107 I. C. C. 271, a complainant attempted (as in the case at bar) to obtain what the opinion referred to at page 274 as "rate advantage" by the "establishment of similar transit arrangements at Cincinnati". In denying relief the opinion states:

"The Supreme Court of the United States has held that a line which participates in a joint rate is not guilty of undue prejudice in failing to accord a transit service at a point on its line merely because another carrier party to the same joint rate does not accord transit service. Central R. R. Co. v. United States, 257 U. S. 247. In view of that decision the Big Four, which is the only defendant serving both Pekin and Cincinnati, could not be found guilty of undue prejudice. The record shows that it does not grant a similar transit privilege at any point on its lines. The lines which serve Cincinnati in respect of traffic from New Orleans, such as the Louisville & Nashville and the Southern, do not reach Pekin with their own rails and had no voice in the establishment of the transit arrangements at that point. Conversely, the Illinois Central which serves Pekin, does not serve Cincinnati and would be powerless to remove the alleged undue prejudice by establishment of a similar arrangement at Cincinnati." (p. 275)

Similar holdings and statements by the Commission appear in *Montgomery Cotton Exchange v. S. A. L. Ry. Co.*, 109 I. C. C. 579, 585; *White Star Refining Co. v. Illinois T. Co.*, 147 I. C. C. 671, 674; *Meridian Grain & Elevator Co. v. A. & V. Ry. Co.*, 38 I. C. C. 478.

31 *Utah Poultry Producers Co-op. v. Union Pac. R. Co.*, (C. A. 10), 147 F. 2d 975, 976, in a case involving interpretation of a tariff, states:

"Under the rules of the Interstate Commerce Commission governing the making, filing and publishing of tariffs, transit privileges are treated as a matter local to the railroad on which the transit point is situated. The local carrier determines both whether the privilege shall be granted and the condition under which it may.

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instant case for departing from this rule. As shown in the next section of this brief, such rule has long prevented any violation of Section 3 being founded upon the transit situation in this case.

B. The Criteria That as Many new Routes "as possible" may be Required to Provide as Much Flexibility and as Many Markets "as possible", Would Nullify the Short-Hauling Restrictions of Section 15(4).

Section 1(4) creates a general duty on the part of carriers to "establish reasonable through routes". The word reasonable was inserted in this paragraph by the 1940 amendments. Previously the obligation was to "establish through routes" (54 Stat. 900).

The criteria which have been set up by the Commission and the court in this case for measuring the adequacy of existing routes and the duty of railroads to establish additional routes would render all statutory restrictions on short-hauling nugatory. The idea that food articles of a perishable nature require "as wide a dis-

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be exercised. See Central R. Co. of New Jersey v. U. S., 257 U. S. 247, 42 S. Ct. 80, 66 L. Ed. 217."

Roberts, Federal Liabilities of Carriers, (2nd Ed.) Volume I, Section 207, page 486, states:

"Under the rules of the Commission governing the making, filing and publishing of tariffs, transit privileges are treated as a matter local to the railroad on which the transit point is situated. A transit charge is therefore a local charge for which the carrier establishing it is alone responsible, and the mere fact that a carrier participates in joint rates in connection with which a transit arrangement is allowed at points off its line does not make it guilty of undue prejudice by failing to accord transit to a point on its line; for mere participation in joint rates does not make connecting carriers partners, and they can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination."

tribution as possible", "as many routes as possible" and "as many markets and outlets as possible" and that these requirements justify the opening of new routes, constitutes a clear departure from the standards of Section 1(4), and establishes a criterion that may conveniently be used at the whim of the Commission whenever and wherever such articles are shipped. Such an abstract measuring stick amounts to an adoption by the Commission of unlimited short-hauling as advocated by the witnesses of Rio Grande.

The statutory history and requirements previously reviewed demonstrate that any such standard is at war with the design and intent of Congress. "The law exacts only what is reasonable from such carriers", *Midland Valley R. R. v. Barkley*, 276 U. S. 482, 485; *Penna. R. R. v. Puritan Coal Co.*, 237 U. S. 121, 133.

It is these new "standards and criteria" set up by the Commission that are the subject of penetrating analysis in the dissenting opinion of Circuit Judge Johnsen. This Court will want to carefully weigh this entire dissenting opinion, some of the observations of which are quoted below[32] in support of the conclusion that if the

32 "In other words, whenever it is possible physically and practicably to open up a new or an additional through route for such commodities, the Commission apparently feels entitled to exercise its power to do so, in order to make available any increase in the amount of transit privileges en route which can be provided for such through-traffic, on the basis of simply declaring, as it in effect did here, that the previous through routes are inadequate, since they lack the additional transit privileges of the new carrier's route, which some shipper may desire or can solicitedly be persuaded to use * * *." (R. 171.)

" * * * I am at least convinced that, where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate des-

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standards adopted in this case are the law "then the railroads of the country may as well forget Section 15(4) entirely, as affording them any protection whatsoever against deprivation of their long hauls."

The conclusions set forth in this able dissenting opinion are apparent, as stated by its author, to anyone "who reads the Commission's Report * * * stripped of all the confusion in which the Report has been wrapped." The penetrating analysis in this opinion demonstrates that this case is "but another attempt by the Commission to gain a new foothold, under another disguise, for the philosophy and position" of unlimited short-hauling; and, by use of these false standards to "get the camel's nose under the tent".

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tinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term 'more economic transportation' under section 15(4), in the addition of another carrier's route as a mere 'bridge' line for such traffic. If that be not so, then there is not any situation in which the Commission can not make a finding of 'more economic transportation' for whatever additional through route it may undertake to open up, since in all cases joint rates necessarily, from their very nature, are lower than combination rates otherwise applying.

"Let me add in summary that, if it can properly be held, as the Commission has done here, that perishable commodities are entitled to 'as many routes as possible' and 'as much flexibility as possible in the distribution process', so that on this basis, and without regard to any other factor, any existing through route can be called inadequate * * *." (R. 172.)

"The philosophy and standard which the Commission has used are unquestionably sound as a marketing principle, but the railroad transportation system of the country has never yet been relegated by Congress to the full impact of marketing principles alone. There is not a distributor of any commodity—including perishable foods—who, up to the time at least of the Commission's present order, has had, or has been regarded as being entitled to have, as a matter of sound transportational concept, every avenue and facility that it is possible to open up for him, with a simple brushing aside of transportational conditions, realities and consequences, such as I think the Commission here did." (R. 175.)

Never before, we suggest, has any judge in any court pointed up more devastatingly the "merry-go-round" devices, sustained by the majority of the district court, which have been weaved into a Commission decision; and which, "with a simple brushing aside of transportational conditions, realities and consequences", are claimed to result in "more economic transportation", within the meaning of Section 15(4)(b) of the Act.

C. The Order is Void Because the Commission Departed From and Failed to Make the Findings Required by the Standards of Section 15(4)(b) Which the Commission Expressly Invoked.

In *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, this Court, in an opinion by Mr. Justice Frankfurter, said at page 87 that:

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

At page 89 the Court said the Securities Commission's "action must be judged by the standards which the Commission itself invoked", and, pointing out that the grounds urged by counsel to the Court "in support of the Commission's order were not those upon which its action was based", the Court refused to sustain the validity of the order, saying at page 95 that:

> "* * * an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

The Court remanded the case to the Court of Appeals, and in an opinion in the same case upon its return to this Court, 322 U. S. 194, 196-197, the principles quoted above from the Court's first decision were reiterated.

The first of those decisions (318 U. S. at page 94) repeated the settled rule that "orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." The Court further said that the Commission's "action must be measured by what the Commission did, not by what it might have done" and that the action "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order * * *" (p. 94).

In the instant case the Commission was specific and explicit in stating the precise standards invoked by it in ordering through routes and joint rates. Although it made findings under other sections of the Act, it found that there were no through routes via the Rio Grande on the traffic concerned, and stated (R. 33),

> "* * * that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation."[33]

Thus, while the Commission recognized all the elements required to be found under section 15(4)(b), its

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[33] Section 15(4)(b) of the Act permits the Commission to order a new route that short-hauls existing ones if "the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation".

But this authority is "applicable only where the Commission makes the *special findings listed* in the amended Section 15(4)[b]. *Thompson v. United States*, 343 U. S. 549, 555. (Italics added.)

finding and conclusion as to through routes and joint rates was as follows:

> "We conclude: 1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established." (R. 73.)

There is no finding in the foregoing as required by Section 15(4)(b) that the Rio Grande route is "needed" or will provide "more efficient" transportation.

It will be noted that in Section 15(4)(b) the word "adequate" is used conjunctively with the words "more efficient" or "more economic". In *D. A. Stickell & Sons, Inc. v. Alton R. Co.*, 255 I. C. C. 333, at page 343, the Commission said:

> "We interpret that exception to mean adequate and more efficient *and* more economic from the public's or shippers' as well as the participating carriers' standpoint." (Italics added.)

The Commission therefore construes the word "or" just before the words "more economic" as meaning "and". That interpretation was sustained by the three-judge court in *Pennsylvania R. Co. v. United States*, 54 F. Supp. 381, in an opinion which was affirmed by this Court, *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, at page 593. Interpretation of the word "or" as meaning "and" has been approved by the courts when such interpretation is necessary to give effect to the clear intention of the legislature. *United States v. Fisk*, 70 U. S. 445. The Commission's interpretation, sustained by this Court, of the word "or" as meaning "and" is necessary to conform clause "(b)" of Section 15(4) with the declared

purpose of the National Transportation Policy to promote "safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers."

As properly construed by the Commission and the Court, before it may exercise the authority granted by Section 15(4)(b) to short haul a carrier, the Commission must find upon substantial evidential facts that the proposed new route is "needed" to and will accomplish each of the three conditions there specified, first "adequate" transportation, second, "and more efficient" transportation than that provided by existing routes, third, and "more economic" transportation than existing routes provide. As the Commission did not, as apparently it could not, find that the Rio Grande route is "needed" for the "bridge" traffic it seeks, or that it will provide "more efficient" transportation for that traffic than Union Pacific routes, it has failed to meet the requirements of the standards it invoked, and the order must be set aside under the rule applied in the *Chenery* cases cited above.

In addition to the defects just discussed, the Commission speaks of the need for "more adequate and economic service." If new routes may be opened up on the theory that the more routes there are the "more adequate" the transportation service will be, then there is, of course, no limit on what the Commission may do in this field. This would be especially true where, as here, the proposed route is deemed "more adequate" simply and solely because (with its rates reduced as required by the order) it will give some shippers lower rates via the Rio Grande than they now have over that line, or because the Union Pacific is not available to shippers located only on the Rio Grande. Such departures from and

loose dealing with specific statutory standards may not be permitted. *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 488; *Western Air Lines v. C. A. B.*, 347 U. S. 67, 71; *Delta Air Lines v. Summerfield*, 347 U. S. 74, 79.

The Order may not be Upheld Upon Grounds not Invoked by the Commission.

Apparently realizing that after expressly invoking the standards of Section 15(4)(b) the Commission's departure from and failure to make findings in conformity with all of the requirements of those standards vitiates the Commission's order and requires that it be set aside, counsel for both the Government and the Rio Grande have already indicated in their respective Jurisdictional Statements that they hope to persuade this Court to sustain the order upon some other standard than those of Section 15(4)(b) which the Commission invoked. At page 10 of the Government's Jurisdictional Statement it is asserted that:

> "An independent basis of the Commission's order establishing through routes was its finding that the combination rates between the Union Pacific and the Rio Grande were, to the extent that they exceeded the joint rates via the Union Pacific routes to the same points, unjust and unreasonable and unduly prejudicial of shippers and receivers using the Rio Grande, and unduly preferential of shippers and receivers using the Union Pacific routes, in violation of Section 3(1) of the Act."

The Rio Grande's Jurisdictional Statement states at pages 12 and 27 that the short haul prohibition of Section 15(4) does not apply "[w]here discrimination and undue prejudice is found under Section 3 of the Interstate Commerce Act."

"Thus, counsel for both the Government and the Rio Grande ask the Court in this case to do the very thing it refused to do in *Securities Comm'n v. Chenery Corp., supra*, namely, to sustain the validity of the order upon grounds or standards other than those of Section 15(4)(b) which the Commission expressly and avowedly invoked. While we demonstrate elsewhere in this brief that findings of a violation of Section 3 afford no basis for compelling through routes and joint rates that short haul existing routes, the point here is that even if the Commission could order through routes upon findings under Section 3, it did not purport to do so in this case but instead expressly declared that in ordering through routes and joint rates it was acting upon the authority, standards and requirements of Section 15(4)(b). "Since the decision of the Commission was explicitly based upon the applicability of" those standards and requirements "its validity must likewise be judged on that basis", first *Chenery* case, 318 U. S. 80, page 87.

The Commission having departed from, misapplied and failed to meet the requirements of the standards it explicitly invoked, this Court will not attempt to sustain the order by searching for or spelling out "a more adequate or proper basis" for it, second *Chenery* case, 332 U. S. 194, page 196; *Florida v. United States*, 282 U. S. 194, 215; *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 488-489.

D. The Order is Void Because This is a Financial Needs Case Within the Prohibition of Section 15(4).

Section 15(4) contains a very emphatic mandate that—

"No through route and joint rates applicable thereto shall be established by the Commission for the pur-

pose of assisting any carrier that would participate therein to meet its financial needs."

This plain and unequivocal language would indicate to any reasonable person that a carrier seeking financial benefits would hardly be a suitable party to institute a proceeding thereunder. Nevertheless, the Commission denied a motion to dismiss the compiaint, saying merely that in reaching its conclusions "no consideration has been given to the financial needs" of the Rio Grande (R. 34).

It became evident quite early in these proceedings that Rio Grande had not been pushed into this litigation by shippers or anyone else. The President of Rio Grande frankly testified at the first hearing that in filing this proceeding against over two hundred defendant railroads, he was not able to get any other railroad to join with him (V. I, 47).[34] He frankly stated that his objective was to obtain more bridge traffic and do better on transcontinental business and thus improve the Rio Grande's financial position (V. I, 48). This line of testimony was also supported by Witness Hogue for the Rio Grande, who said that due to loss of local business they had to get more transcontinental freight (V. I, 69).

The essential nature of this proceeding was recognized by the Commission, when it observed (R. 37-38):

> "The Rio Grande desires to participate as a bridge line on such traffic via its Colorado gateways and Ogden at the joint through rates."

The Commission reviews, in some detail, the increase in "bridge traffic" experienced by the Rio Grande dur-

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34 Rio Grande's President also testified he conferred with Union Pacific's President " regarding our necessity for the competitive joint rates here requested." (V. I, 45.)

ing the past fifteen years and emphasizes that development of "bridge" revenue has offset the trend as to local traffic.[35]

Nowhere in the complaint filed with the Commission is there any allegation or statement that there is any demand by shippers for the routing proposed by the Rio Grande. The complaint does not once mention Section 15(4) of the Act. Throughout the proceeding Rio Grande staked its case on the false assumption that this provision of the Act was not applicable.

U. S. v. Great Northern R. Co., 343 U. S. 562, confirms our position that the financial needs prohibition establishes a new and "independent" restriction against short-hauling.[36]

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35 The concern of the Commission for assisting Rio Grande in obtaining further revenue is reflected in the statements (R. 47):

"Strictly local traffic was less annually throughout the 15-year period, including the war years, than during the 6-year period 1924 to 1929, inclusive.

"The reasons given for the decline or lack of proportionate growth in traffic originated are (1) depletion of nonferrous ores in Colorado and the closing of smelters, except one now operating at Leadville, Colo.; (2) decline in the amount of coal originating on the road; (3) decline in production of lumber and its products in the area served, and the discontinuance of operation by many sawmills; and (4) loss of local traffic to other forms of transportation.

"The relative decline in strictly local traffic has been offset by increases in traffic originated and shipped out over connecting lines, and traffic received from connecting lines and terminated."

36 In that case the opinion by Chief Justice Vinson said (343 U. S. 571, 572):

"Appellants would have the Court ignore the fact that the financial assistance prohibition stands as a separate sentence in Section 15(4). Certainly that sentence is gramatically capable of independent significance. * * *

"As revised in 1940, Section 15(4) deals at length with the short haul problem and, in addition, contains the separate sentence prohibiting the establishment of through routes for the purpose of

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Thompson v. United States, 343 U. S. 549, decided the same day, speaks of Section 15(4) as bestowing a "guaranteed right" on a railroad to serve points "via its own lines" (page 559). In rejecting the Commission's argument in that case "as requiring an unwarranted distortion of the statutory pattern", the opinion states:

> "In short, acceptance of the Commission's argument would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage." (p. 560)

Our view that the Rio Grande's request and the Commission's order cannot be sustained under the statute is strengthened by a consideration of the testimony as a whole. When carefully weighed, the proof demonstrates that financial gain for the Rio Grande constitutes the only basis for the proceeding before the Commission. Since the entire traffic involved in this case is transcontinental traffic, the movement of which the Rio Grande desires to share as a "bridge" line, the only purpose that can be served is the aggrandizement of the treasury of Rio Grande railroad.

The letter and spirit of the statute is that the desire for "more money" shall be completely divorced from such proceedings and shall not activate any short-hauling claims. Unless the purpose of the statute is respected in a proceeding so dominated by financial gain as this one, the statute will have little application or effect. This

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assisting a carrier to meet its financial needs. Since this prohibition stands as an independent sentence dealing with an independent problem, we cannot accept appellants' suggestion that the sentence can be ignored unless a short-hauling problem is also involved in the case."

was recognized in the *Thompson* case, *supra*, where this Court said (343 U. S. 559-560):

> "The Commission, by using the form of order employed in this case, could also divert traffic from existing through routes to the lines of a weak carrier solely to assist that carrier to meet its financial needs, thereby evading completely the applicable prohibition of section 15(4), before the Court in United States v. Great Northern R. Co., 343 U. S. 562 (decided this day)."

The majority opinion of the court below mistakenly assumed that in permitting the Commission's order to stand only as to shipments requiring "in-transit privileges at points on the Rio Grande", it would eliminate the charge "* * * that the order was for the purpose of assisting the Rio Grande to meet its financial needs." We submit that no court could by cutting down the scope of a Commission order, change the design, purpose and effect or the validity of an order previously entered. *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 87, 94-95. The remedy for violation of the financial needs prohibition must be the abolition of the order, not merely the whittling of it.

The truth is that the present proceeding is merely a continuation of the Chamber of Commerce effort started a hundred years ago to route transcontinental traffic through Denver and Colorado. This effort originated with the proposals in Congress to build the first transcontinental railroad.

History shows that the route to be followed by the Union Pacific became a "burning question" in Congress and "frantic" efforts were made by Denver to become a half-way station on the route. All such pressures were

rejected by President Lincoln who followed General Dodge's recommendation in routing the Union Pacific via the "great open road" out of the Platte Valley.[37]

E. The Commission's Order Disregards and is Inconsistent With the National Transportation Policy of Congress Which is a part of Every Provision of the Act.

It is specifically provided in the "National Transportation Policy"[38] that the provisions thereof shall ap-

37 Sabin, E. L., Building the Pacific Railway, Lippincott, 1919, pp. 22, 27, 30, 135, 140. Galloway, J. D., The First Transcontinental Railroad, Simmons-Boardman 1950, pp. 235-236, 253.

Brigham Young denounced General Dodge from his tabernacle pulpit for not routing the line through Salt Lake City. Dodge, G. M., How We Built the Union Pacific Railway, Senate Document 447, 61 Cong. p. 27. General Dodge later declared: "[t]he Lord had so constructed the country that any engineer who failed to take advantage of the great open road from here west to Salt Lake would not have been fit to belong to the profession * * *" (Ibid., p. 116.)

"* * * the decision of General Dodge to avoid the crossing of the Rocky Mountains directly west of Denver was proved correct when other railroads were built therein." Galloway, J. D., The First Transcontinental Railroad, supra, p. 257.

38 49 U. S. C. A. 1, 54 Stat. 899:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote, safe, *adequate, economical and efficient service* and foster *sound economic conditions* in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or *unfair or destructive competitive practices; to co-operate* with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; — all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, *adequate to meet the needs* of the commerce of the United States, of the Postal Service, and of the national defense. *All of the provisions* of this Act shall be administered and enforced with a view to *carrying out the above declaration of policy.*" (Italics added.)

ply to "[a]ll of the provisions of this Act", which shall be "administered and enforced with a view to carrying out" the declaration of policy.

Although the broad and far-reaching questions presented in this case involve some of the most important problems of policy that may arise under the Act, the report of the Commission completely ignores the Congressional directive as to policy. There is not a single reference to transportation policy in the entire discussion of the Commission. This alone, under a very recent three-judge opinion, justifies and requires annulment of the Commission order.[39]

The record shows that practically all of Rio Grande's supporters found their position on the virtues of opening all gateways. They therefore oppose the policy of Congress which has consistently refused to "eliminate the short-hauling restriction on its power to establish through routes."[40] The Commission necessarily based its order on that part of the testimony, for all other shipper witnesses opposed the Rio Grande.

We submit that the proof overwhelmingly establishes that the request of the Rio Grande is not consistent with important provisions of the National Transportation Policy. Instead of promoting economical and efficient service, such proposals will (1) waste long established

39 A three-judge court in *Cantlay & Tanzola v. United States*, 115 F. Supp. 72, reflected the purpose and intent of the Congressional statement of policy when it set aside the order of the Commission which sanctioned reduced petroleum rates of rail carriers, on the ground that the order contained no jurisdictional basic statement or finding with reference to national transportation policy.

40 *Thompson v. United States*, 343 U. S. 549, 556. *United States v. Mo. Pac. R. Co.*, 278 U. S. 269.

and highly improved facilities, (2) impair service throughout Union Pacific territory, (3) increase costs and rates which shippers and the public must pay, (4) adversely and seriously affect public and private interests in States such as interveners, and (5) jeopardize our national defense.

As public administrators of transportation within our respective States, these interveners believe it is of the highest importance that the mandate of Congress as to policy be considered and carried out. It is our position that under this record a fundamental question is presented as to whether the Commission has authority to institute what amounts to wide-open routing. In our opinion, unless this fundamental policy question of unlimited short-hauling receives full consideration, the implications and effects of this decision escape recognition.

All of the traffic involved is "bridge" traffic. The testimony refers to only a few of the thousands of items comprising transcontinental traffic. Since the amount of diversion according to the Commission, depends on the solicitation success of Rio Grande, the Commission's order, in effect, gives Rio Grande a license to hawk business. If that is sufficient to open a gateway, then all gateways may be opened.

We submit that it is clearly inconsistent with the above transportation policy to sacrifice the transcontinental haul of the most efficient carriers over the shortest and most efficient routes in order to provide "bridge" traffic revenue for Rio Grande.

Paraphrasing Mr. Justice Holmes in *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, relief cannot be

justified under the established transportation policy in order to put railroads on an "equal footing" or to satisfy the "personal preferences" of certain shippers "desiring" an additional through route or to provide a "variety of routes" or to "search over a wide area" for opportunities. Moreover, relief cannot be justified in order that transcontinental freight may "behold the natural beauties that may be rivaled but not repeated on the other roads." In short, as stated in that opinion, p. 545, "[t]he condition in the statute is not to be trifled away."

The declaration of policy by Congress is not merely a guide for the Commission. As stated by this Court in *United States v. Rock Island Co.*, 340 U. S. 419, this declaration controls the "basic power of the Commission." The paramount and overriding policy of Congress, since 1920, as repeatedly held by this Court, has been to promote economy and efficiency in rail transportation and avoid the "harm to the public" which unrestrained competition between carriers may engender.[41]

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41 *McLean Trucking Co. v. U. S.*, 321 U. S. 67. In that case this Court refers to the "sharp change" in policy adopted in 1920 (p. 80) and the "altered emphasis in railroad legislation on achieving an adequate, efficient and economical system of transportation" (p. 83), reflecting "the product of a long history of trial and error by Congress." (p. 80)

In *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277, Mr. Justice Brandeis observed that "when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss."

Other cases stress the emphasis on economy and efficiency. *American Trucking Assns. v. U. S.*, 344 U. S. 298, 314. *N. Y. Central Securities Co. v. U. S.*, 287 U. S. 12, 25.

In *Commission v. Sanders Radio Station*, 309 U. S. 470, 474, it is pointed out that in railroad legislation, Congress has "abandoned the principle of free competition," in favor of the "suppression of wasteful practices."

The wasteful and inefficient practices inherent in the Rio Grande proposals and the Commission's order are in irreconcilable conflict with the requirements imposed by Congress. The "primary aim of that policy" is to "secure the avoidance of waste" as well as the "maintenance of service" which is a "direct concern of the public." *Texas v. United States*, 292 U. S. 522, 530. The invitation to unrestrained solicitation, proposed in the Commission's order, amounts to "cut-throat" competition which has been rejected since 1920. *United States v. Louisiana*, 290 U. S. 70, 74.

The doctrine that transportation acts of Congress constitute remedial legislation and justify liberal interpretation (*Piedmont & Northern Ry. Co. v. Interstate Commerce Com'n*, 286 U. S. 299, 311; *Pennsylvania R. Co. v. United States* (D. C. Md.), 54 F. Supp. 381, 390), would seem to be as applicable to a statement of policy as to any provision in the Act.

It has accordingly been held that under the policy of the Act, disputes are not to be settled "in accordance with the exigencies of particular circumstances" as though only the parties' "private interests or equities were involved", but that, instead, a "rigid adherence to the statutory scheme and standards is required", despite the fact that this "obviously may work hardship in some cases." *Midstate Co. v. Penna. R. Co.*, 320 U. S. 356, 361.

This Court has heretofore deemed legislative policy so important that an expressed or implied policy will be

followed "sacrificing, if necessary, the literal meaning in order that the purpose may not fail."[42]

Gateways are an essential part of the railroad industry. They represent a means of survival in an increasingly competitive economy. Unless the Congressional policy with reference to their preservation is respected, important provisions in the Act will, in effect, be nullified. *Thompson v. United States, supra*, pp. 559-560.

F. Other Inconsistencies and Departures From Prior Decisions.

The Commission report in this case is replete with contradictions and inconsistencies. It adopts, as stated in the dissenting opinion of Judge Johnsen, an "artificial classification" of commodities such as "perishable food articles" and then applies that classification to granite and marble tombstones and to livestock.[43]

The Commission in treating of "perishable food articles" stresses that the controlling factor in opening a new route is that shipment to market must proceed with "expedition and care", and "without unnecessary interruptions". Then the Commission turns around and holds

42 *Ozawa v. United States*, 260 U. S. 178, 194. *U. S. v. Amer. Trucking Ass'ns.*, 310 U. S. 534, 543. *U. S. v. Rosenblum Truck Lines*, 315 U. S. 50, 53. See also: *Holy Trinity Church v. United States*, 143 U. S. 457. *Markham v. Cabell*, 326 U. S. 404. *Helvering v. N. Y. Trust Co.*, 292 U. S. 455.

The Court will not sanction "an evasion of the whole of the policy of the law.". *Sundry Goods, &c. v. United States*, 2 Peters 358, 367.

43 "* * * it has, by means of some artificial classification, included ordinary livestock as a perishable food article (p. 656), saying merely, before doing so, that 'We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive routes over the Rio Grande via the Ogden gateway'".

that such shipments should be interrupted for as much as 12 months for transit services while en route to market (R. 70).

The application of such "criteria" to the "little monument dealer" is aptly evaluated by Judge Johnson (R 174).[44]

The findings with reference to the onerous physical features of Rio Grande operations, previously mentioned, although not fairly reflecting the complete dissimilarity of physical and transportation conditions on the Rio Grande compared with the Union Pacific, are nevertheless wholly inconsistent with the conclusion of the Commission that somehow and in some way, when one gets east and south of the Missouri River these natural and irreducible physical dissimilarities in "transportation conditions" disappear and such "transportation conditions" become "substantially similar" (R. 72).

In this connection, Judge Johnsen points out that the "[r]eport does not undertake to show what amount of traffic goes where". The opinion of Judge Johnsen reviews the extensive findings of the Commission report as to the contrasting character of the Union Pacific and Rio

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[44] "I shall not take the time to go into the details of this trivial monument situation, which the Commission characterized as one 'of 'urgent need' (p. 638), except to comment that it is typical of the Commission's approach, result and intended reach. Why a little dealer, who wants to make local peddlings of 4 carloads of tombstones is entitled to have the Union Pacific join in giving him the opportunity to do so on a through rate basis is a bit beyond me. But more than this, if tombstones constitute a commodity that is entitled to this extreme transit privilege, on the same basis as perishable foods, then the Commission's purported basis of 'as many routes as possible' and 'as much flexibility as possible in the distribution process' for perishable foods is meaningless, and it seems rather apparent what this initial action of the Commission here portends for the transportation system generally of the country."

Grande routes, and concludes that the report makes no "rational demonstration" that the "elements of difference" in transportation can be said to be "relatively insignificant".

The ultimate conclusions of the Commission as to the establishment of new routes are utterly inconsistent with specific findings of the Commission as to efficiency, economies, circuity, adequacy of service, elevation, and transportation needs.

The Commission recognized that under Section 15(4) no relief may be granted "unless the existing routes can be found not to provide 'adequate' transportation" (R. 69). Earlier in the report the Commission praises the fine service of Union Pacific and details some of the proof showing the physical infirmities of Rio Grande service and facilities (R. 62). Without making any specific finding whatever that the new route is "needed" as provided in Section 15(4), the Commission concludes that Union Pacific routes are "inadequate" because they are not available at points on the Rio Grande, and that it is "necessary and desirable in the public interest, in order to provide adequate and more economic transportation", that the Rio Grande route and equal joint rates be established on certain commodities (R. 70, 73). We submit that the findings of adequacy and inadequacy are conflicting and inconsistent, and do not support or justify the order. *Florida v. United States*, 282 U. S. 194, 215.

The Commission concludes that the extent of diversion of traffic will depend upon the success of Rio Grande's "solicitation" and campaign to "persuade" and "induce" shippers to use its "bridge route" (R. 46). It is difficult to understand how that route can be "necessary" or "needed" if its use will depend upon future so-

licitation and persuasion. Here again we are confronted with findings that are irreconcilable with conclusions.

The Commission details the injuries that may occur as a result of diversion of traffic (R. 65), then states that it cannot even "estimate with any degree of accuracy, how much traffic might be diverted" (R. 66) but goes right ahead and establishes the new route without indicating whether or not the interests of these intervenors and others will be injured or whether their injuries are of any consequence. Although the Commission professes to have no idea as to the volume of traffic that will move under this order, it has no hesitation in finding that the terminal bottleneck at Salt Lake City provides sufficient "present facilities" for interchanging with the Rio Grande "the additional traffic * * * which will result under the findings herein made" (R. 73).

We submit that the report and order of the Commission are permeated with "conflicting inferences" and constitute such a hodge-podge of inconsistent findings and conclusions that it does not comply with legal requirements. *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499.

The Commission's most conspicuous departure from prior decisions concerns livestock where its own prescribed rates "previously recognized and accepted" but not required over routes that "would result in short hauling" are here prescribed without such limit, and without explanation (R. 177).[45]

45 Judge Johnsen states as to these livestock rates:

"I also may add that what the Commission has here done as to livestock is a departure or exception from the long-established gen-

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We have previously noted that the present report of the Commission constitutes a radical departure from a long line of decisions interpreting and applying the through routes provisions of Section 15(4).[46]

In the fourth section of this brief we shall review the commingling and misuse of separate and independent provisions of the Act involved in the Commission decision. This argument reflects repeated departures from the rule of prior decisions in order to achieve the result in the present case. We suggest that the authorities reviewed in Section IV be considered equally applicable to the points now under consideration.

III.

Rio Grande Claims of Violations of the Act and the Finding by the Commission of a Violation of Section 3(1) Cannot be Sustained Upon the Evidence of Record

We emphasize in Section II.C. of this brief that since the Commission based its order on compliance with

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eral livestock scheme, practice and policy which the Commission has previously recognized and accepted. In Livestock, Western District Rates, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611, 200 I. C. C. 535, the Commission prescribed rates on livestock in western territory, predicated generally on the shortest routes over which carload traffic could be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short-hauling within the meaning of section 15(4) of the statute * * *. It would seem to me that the upsetting of this general, established scheme, practice and policy as to livestock rates, in the present situation, apart from the other aspects of the question here involved as to the livestock, is entitled to some explanation on the part of the Commission, if it is to escape the implication of an arbitrary departure as against the Union Pacific in its long-hauling of livestock from the northwest territory, as related to the differential permitted to be created by other carriers generally in such situations."

46 See footnote 20, *ante*, p. 39.

the requirements of Section 15(4)(b), the order cannot be supported by claims that the Commission could have sustained the order under other provisions of the Act.

Without departing from the foregoing position we propose to review at this point the "violations" claimed by Rio Grande, and to demonstrate that the record fails to establish any "violations" which may be used by Rio Grande to obtain any type of relief.

This proceeding was instituted by Rio Grande as a rate and revenue case for the purpose of obtaining a financial advantage it does not presently possess. The complaint mentioned Sections 1(4), 3, 15(1) and 15(3) of the Act (V. I, 9). The Commission stated that the Rio Grande claimed "violations of sections 1(4) and 3 of the Interstate Commerce Act" (R. 28). The Commission said that "undue prejudice and preference" as between shippers was established under Section 3(1) but that no "discrimination" under Section 3(4) against the Rio Grande was shown as to the established routes (R. 73 and 72). The conclusion of the Commission (R. 73-74) mentions no additional provisions of the Act.

The Finding of the Commission That Present Combination Rates via the Rio Grande are Unreasonable is Unsupported by Evidence.

Section 1(4) of the Act makes it a general duty of a carrier to establish "just and reasonable" rates; Section 1(5), which was not specified by Rio Grande or the Commission, provides that all charges shall be "just and reasonable"; and Section 15(1) prohibits "unjust or unreasonable" rates. Section 3(1) prohibits a carrier from giving anyone "any undue or unreasonable preference or

advantage", but provides that this section shall have no application "to the traffic of any other carrier of whatever description".

The Commission made a finding (R. 73) that the combination rates on certain perishable commodities were "unjust and unreasonable" and that present "joint rates" of the Union Pacific would be "reasonable for application" over the Rio Grande routes.

These findings were made not only without substantial evidence but without any evidence upon which the Commission could determine whether the combination rates or the joint rates were reasonable or unreasonable. The statement that rates are reasonable or unreasonable is merely "an artificial use of words", *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, 545, and is not sufficient unless there is substantial evidence to back up such findings: *Florida v. United States*, 282 U. S. 194, 213.

The record is wholly devoid of such evidence. This is made clear by the Commission itself where it points out that the Rio Grande submitted a large number of rate comparisons, but that these were limited to comparison of the revenues produced on various commodities by the combination rates compared to those produced by the joint rates and the revenue that would be produced by the joint rates if made applicable via the Rio Grande (R. 67).

There being no other evidence, it results that the Commission's findings that the combination rates via the Rio Grande are unjust and unreasonable rests upon the mere fact that they are higher than the joint rates via the Union Pacific, and its finding that the joint rates are

reasonable for application via the Rio Grande rests not upon evidentiary facts concerning their reasonableness, but upon the mere fact that they are lower than the combination rates.

Some of the considerations which affect the reasonableness of rates were described by the Commission in *Memphis Cotton Oil Co. v. I. C. R. R. Co.*, 17 I. C. C. 313, 318:

> "The reasonableness of a rate must of necessity depend upon the conditions surrounding the traffic at the time it moves. The length of the haul, the competition to be met, the cost of the service, the value of the service, the density or volume of the tonnage, as well as the general transportation conditions then existing, are factors that have a more or less definite relation to the rate that a carrier may reasonably demand for transportation service."[47]

The statement of this Court in *Louis. & Nash. R. R. v. United States*, 238 U. S. 1, 12, that in absence of a "standard" rate comparisons "prove nothing"; in determining the reasonableness of rates, is peculiarly pertinent here.[48]

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47 In *McHenry-Millhouse Mfg. Co. v. N. Y., O. & W. Ry. Co.*, 151 I. C. C. 501, 502, the Commission said:
"We have repeatedly said that the existence of a lower rate between the same points over a route other than the route of movement does not of itself establish the unreasonableness of the higher rate."

48 "The same is true of determining, by comparison, the reasonableness of freight charges. Until some standard is adopted they may prove nothing—even where the two hauls are over the same mileage. For the rate attacked may tend to show that the others are too low—while they in turn might be relied on to prove that the first is too high. Both may be unreasonably high, or too low because compelled by conditions over which the carrier had no con-

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This Court has said that a "through rate is ordinarily lower than the combination of local rates", *A., T. & S. F. Ry. v. United States*, 279 U. S. 768, 771, and the "combination rate itself is ordinarily, if not always, higher than the joint through rate." *Brown Lumber Co. v. L. & N. R. Co.*, 299 U. S. 393, 396.

It is reasonable and to be expected that there shall be differences in service charges "between through shippers over different routes * * * based on relevant differences in the 'circumstances and conditions' of the total transportation services rendered by the carriers." *Baringer & Co. v. U. S.*, 319 U. S. 1, 9.

That long haul through rates should be lower than the total of local rates, has been said by this Court to be beyond argument. *Minneapolis & St. Louis R'd Co. v. Minnesota*, 186 U. S. 257, 262.

There is nothing in the Interstate Commerce Act that requires all carriers to be considered as equal or comparable. As stated by Mr. Justice Brown in *Interstate Com. Commiss. v. B. & O. Railroad*, 145 U. S. 263, 276, the Act "was not intended to ignore the principle that one can sell at wholesale cheaper than at retail."

It is common knowledge that the tariffs of every railroad in this country, including the Rio Grande, carry routing restrictions which preclude application of its

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trol. Water competition, rail competition and competition of markets, enter so largely into the establishment of rates that mere distance is not necessarily a determining factor—indeed the statute itself recognizes that there may be circumstances under which it is lawful to charge less for a long haul than for a short haul over the same road." (238 U. S. 12.)

rates to traffic moving over competing lines. If the bare fact that the Union Pacific and other defendants publish some joint rates that are not applicable via the Rio Grande, constitutes a violation of Section 3, then we confidently assert that it would be difficult to find a railroad of any importance in the country that is not in violation of that section. Carried to its logical conclusion, the Rio Grande position is that if the Union Pacific consents to joint rates that short haul it with one of its connections, then it must, to avoid violating Section 3, make equal joint rates with all of its connections, regardless of short-hauling and of dissimilarity of transportation conditions. Obviously, this is incorrect unless the prohibition in Section 15(4) against short-hauling a carrier without its consent is completely nullified by Section 3.

If a combination of rates via one route becomes unreasonable and unlawful simply because it is higher than a joint rate between the same points via some other, and in this instance a much shorter route, the only remedy lies in wide-open interchange between all lines via every available junction point, regardless of carriers' rights under Section 15(4) not to be short-hauled.

We thus find ourselves back where we have been several times in this brief. Regardless of what phase of the case we consider, we always end up with an effort by the Rio Grande to by-pass and avoid the requirements of Section 15(4). It is the settled rule of this Court that this may not be done, *Thompson v. United States*, *supra*, and cases there cited.

A long line of Commission decisions also hold that Section 1 is "subordinate" to Section 15(4) and the Commission will refuse to make a determination as to the reasonableness of rates under such circumstances as would

render "nugatory and meaningless the provisions of Section 15(4)."

49 In *Port of New York Authority v. A., T. & S. F. Ry. Co.*, 144 I. C. C. 514, 517-518, the Commission refused joint rates, saying:

"While we have the power under section 1 to find combination rates unreasonable upon a proper showing, we must in such cases safeguard the carriers' rights under the short-haul provision of section 15 *.* *. In numerous cases we have permitted carriers to cancel joint rates or restrict routing, which had the effect of leaving higher combination rates to apply over certain routes, when it appeared that they did so in order to safeguard their long haul. We have done this on the principle that we have no power to prevent the cancellation of a through route if we could not have established the route as an original proposition. See The Ogden Gateway Case, 35 I. C. C. 131, 140; Routing of Coal from Western Maryland Ry. Mines, 66 I. C. C. 103, 107; Routing of Sheep, 69 I. C. C. 4, 6. Assuming that the record would support a finding under section 1 that the rates over the Hell Gate route are unreasonable to the extent that they exceed the contemporaneous rates over the float routes, the ultimate effect of any order that we might enter would be to open routes that as a practical matter are not now available and render nugatory and meaningless the provisions of section 15(4), if defendants are correct in their contention that certain of them will be short-hauled if the Hell Gate route is opened."

See also, to the same effect: *Western Pac. R. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127, 130.

That section 1(4) is "subordinate" to Section 15(4) is stated in *North American Coal Corp. v. Pennsylvania R. Co.*, 278 I. C. C. 675, 683; *Tidewater Paper Mills Co. v. B. T. R. R. Co.*, 80 I. C. C. 493, 497; *Lemon Cove-Woodlake Asso. v. A., T. & S. F. Ry. Co.*, 139 I. C. C. 239, where at page 244 the opinion shows that the problem, like here, was one of lower rates:

"Complainants would apparently be just as satisfied with a reduction in the existing rates in connection with the Visalia, as for the establishment of a new through route via Exeter."

The Rio Grande is not interested in "reasonable" rates via its longer and more onerous route. Its complaint alleged and it argued vehemently to the Commission that only "equal" rates will enable it to divert the traffic to its line. In its original brief to the Commission, at page 101, it stated that slightly higher rates on live stock "have proved to be useless" to its line and that

"unless the same level of rates [that apply on Union Pacific routes] is prescribed on the traffic involved via the Ogden gateway and the Rio Grande no practical or useful purpose will be served."

It was this kind of a problem and the potential misuse of Section 1 of the Act that prompted this Court in the recent case of *Thompson v. United States, supra*, page 550, to say that by "using the form of order employed" in that case the Commission could "divert traffic from existing through routes to the lines of a weak carrier solely to assist that carrier to meet its financial needs, thereby evading completely the applicable prohibition of Section 15(4)."

While the exact provisions of the Act involved in the rate findings herein of the Commission are not made clear by its report, it would appear that, under Rio Grande's complaint, only Sections 1(4) and 15(1) and 15(3) could be considered. Significantly neither of these sections contains any authority whatever to supersede the short haul restrictions of Section 15(4).

Section 15(1) contains general language requiring a "just and reasonable individual or joint rate." But this paragraph, as shown by authorities reviewed earlier, gives no power whatever to establish new routes. The establishment of such routes must be under and in accordance with the "public interest" standard fixed in Section 15(3), but limited by the restrictions contained in Section 15(4).

Even if a Section 3(4) violation had been established, the only relief that could have been given by the Commission was an "alternative" order. The Commission could not, as will be discussed later, use a Section 3 violation in order to circumvent the short haul requirements of Section 15(4). The remedy of an alternative order for

a Section 3 violation is described in *Texas & Pacific Ry. Co. v. U. S.*, 289 U. S. 627, 650.[50]

As a rate case, this present proceeding cannot stand. For the Commission to fix rates merely to "equalize market competition" under these circumstances would, "confuse an economic problem with a transportation problem".[51] And the "facts surrounding" the establishment of rates "in other territories are not of record" in this case and available for a rate decision.[52]

In view of the uniform decisions of the Commission just reviewed, the holdings upon the facts in this case

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50 "Where an order is made under § 3 an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both * * *. The situation must be such that the carrier or carriers if given an option have an actual alternative."

The necessity and use of alternative orders to remedy Section 3 violations has been the subject of repeated Commission decisions. See *Quanah, A. & P. Ry. Co. v. Atchison, T. & S. F. Ry. Co.*, 205 I. C. C. 253; *The Ogden Gateway Case*, 35 I. C. C. 134.

51 In *Folger & Co. v. A., T. & S. F. Ry. Co.*, 146 I. C. C. 637, the Commission said:

"We have just repeatedly stated, however, that we can not readjust rates merely in order to equalize market competition."

Referring to an earlier cement rates case, the opinion in *Associated General Contractors v. A., T. & S. F. Ry. Co.*, 144 I. C. C. 305, 309, points out that "those who propose a system of rates, the avowed and sole purpose of which is to promote long-distance competition, confuse an economic problem with a transportation problem."

52 The record in the instant case is subject to the same controlling observation made in *Watson Co. v. B. & O. R. R. Co.*, 146 I. C. C. 523, 529:

"The facts surrounding the establishment of the rates shown as applicable in other territories are not of record. While they may be assumed to be reasonable for application between the points shown it does not follow that the same basis or level, distance alone considered, would be reasonable for application between the points herein considered."

that present combination rates are unreasonable and that the joint rates over Union Pacific routes are reasonable for application via the Rio Grande constitutes a departure from the rule and norm of its prior decisions without justification or explanation. In such situations this Court will refuse to approve the order. *Sec'y of Agriculture v. United States*, 347 U. S. 645.

Neither a Finding of Undue Prejudice Under Section 3(1) nor of Unjust Discrimination Under Section 3(4) can be Made in View of Admitted Dissimilarity in Transportation Conditions Proved by the Evidence.

Except for the Bamberger Railroad south of Ogden (R. 73) the Commission held that discrimination against the Rio Grande under Section 3(4), prohibiting discrimination by one carrier against another, was not sustained by the record because the "transportation conditions" over existing routes were not shown to be similar to those on the Rio Grande (R. 72).

There was a complete absence of any evidence as to transportation conditions on the other rail routes from the Pacific northwest to the east. But there was abundant proof showing dissimilarities between transportation conditions on the Union Pacific route and on the Rio Grande. All of these differences were completely disregarded by Rio Grande, and at no stage of this proceeding has Rio Grande received any encouragement that it could disregard fundamental requirements of Section 3(4) and yet obtain relief thereunder.[53]

53 It is elementary that in order to establish discrimination or a lack of "equal" treatment there must be proof that the transportation conditions involved are similar. Unless this is true there would be

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The Commission's finding that conditions were "less favorable" on the Rio Grande should, standing alone, have been enough to justify a similar result under Section 3(1), which is quoted below.[54] Nevertheless, and despite its finding that dissimilarity in transportation conditions prevented a finding of discrimination against the Rio Grande, the Commission said the combination rates of the Rio Grande unduly prejudiced shippers desiring to use that line.[55] If transportation conditions are not sim-

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a violation of Section 3(4) every time a carrier that interchanged traffic with one connection refused to give up traffic to another carrier with whom it had a physical connection.

The burden was on Rio Grande to establish the similarity of transportation conditions. The Commission was without power, in the absence of such proof, to make the finding the Rio Grande now says it should have made. *Int. Com. Comm. v. Louis & Nash. R. R.*, 227 U. S. 88. *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541.

54 "It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

55 The majority opinion below held that there was no legal or factual basis in the evidence to support the Commission's finding that the combination rates were unduly prejudicial in violation of Section 3(1), and the dissenting opinion holds that the evidence furnishes no support for that finding. The questions presented by the appeals of the Rio Grande (No. 117) and the Government (No. 119) challenge that holding, among others, of the district court.

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ilar under Section 3(4) how can they be considered similar under Section 3(1)? That they are not similar is sufficiently demonstrated by the Commission's own findings (R. 71-72) and by the opinion of Circuit Judge Johnsen, which was reviewed earlier.[56]

The Commission rightly held that "complainant," a railroad, could not raise, in its own behalf, an issue under Section 3(1) against another railroad" (R. 33), and rightly observed, but failed to apply its holding, that Rio Grande is "not here as a shipper or receiver of traffic

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The majority held that even if the evidence had proved undue prejudice and preference in violation of Section 3(1) "the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15(3) and 15(4)" and that—

"If the Commission could order through routes and joint rates between two or more competing railroads under Sec. 3(1) merely because a shipper entity described in Sec. 3(1) located on one railroad had a transportation advantage over such an entity located on the other railroad, the prohibition of Sec. 15(4) would be practically emasculated." (R. 164.)

56 Judge Johnsen states in this connection:

"I do however not think that there exists any basis on which to declare the Union Pacific and its connecting through-route carriers guilty of unreasonable preference or unreasonable prejudice under section 3(1), in having refused to join with the Rio Grande to make the latter available as a bridge line for hauling through traffic at the same rate, over a 200-mile longer route, with a 66.3 per cent greater variation in grade, involving a 24-hour additional hauling time, and necessitating the furnishing of several more terminal-yard services. I do not believe that these facial railroad realities would permit of a finding of such a discrimination as was intended to be reached by section 3(1). If the Commission has attempted to predicate the relief which it here granted upon the existence of a violation of section 3(1), I am certain that its action resting on this basis alone could not on these facial realities be upheld. Only an escape from these facial realities, through a dissolution of them under the considerations open to the Commission in section 15(4), such as the Commission here attempted, could at all, in my opinion, on the facts of the situation, have furnished a basis for the prescribing of through routes and joint rates in relation to the existing conditions." (R. 178.)

but solely as a carrier seeking to participate in traffic" (R. 68).

Having no rights under Section 3(1), since it applies only to shippers or receivers of freight (*Texas & Pacific Ry. Co. v. U. S.*, 289 U. S. 627, 628), Rio Grande brought certain shippers into the proceeding. This did not improve the legal defect in the position of Rio Grande. In addition, there was not sufficient proof to sustain a violation of Section 3(1) even if Rio Grande shipper witnesses were treated as complainants before the Commission.

The incapacity of Rio Grande to obtain relief under the circumstances is not cured by the participation of a few shippers in this proceeding. Under well-settled legal principles the Rio Grande cannot maintain this action for itself nor as representative of shippers as to whose claim it has no remedial interest and is not the proprietor.[57]

Intervention is, of course, ancillary and in complete subordination to the main proceeding.[58] An "independent

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57 The cases are collected in 67 C. J. S. 899 & 39 A. J. 858. As stated by Chief Justice Marshall in the *Corporation of Washington v. Young*, 10 Wheaton 406:

"No person who is not the proprietor of an obligation, can have a legal right to put it in suit."

58 Summarizing the cases, 39 A. J. 950 states:

"Intervention is not an independent proceeding, but an ancillary and supplemental one which, in the nature of things, unless otherwise provided for by legislation, must be in subordination to the main proceeding, and it may be laid down as a general rule that an intervener is limited to the field of litigation open to the original parties * * *."

controversy" cannot ordinarily be injected into a suit by intervention."[59]

The Rio Grande cannot, of course, rest its case on the claim that it is enforcing a public right. 39 A. J., p. 863. Neither can the Rio Grande assert that it appears in this matter in any "representative" capacity, since it has no "right or interest in common with the persons claimed to be represented." 39 A. J., pp. 921-922; 67 C. J. S., p. 920.

The Proviso to Section 3(1), Added in 1940, Prevents any Finding of Discrimination Here.

In this connection, however, and with reference to Section 15(4) we call attention to the proviso added to paragraph 3(1) in 1940, which states:

> "* * * this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." (449 U. S. C., Section 3(1).)

If this proviso means anything it must mean that paragraph 3(1) cannot be applied to sustain discrimination involving the traffic of "any other carrier." In other words, discrimination thereunder is by a carrier between persons it is serving and cannot be applied in the case of claimed discrimination involving the traffic of other carriers. This being true, the language in Section 15(4) "except as provided in section 3" does not permit the

59 39 A. J. 860-61 states:

"* * * it is well settled that if a plaintiff at the time of commencing an action has no valid and subsisting title or right to the subject thereof, his subsequent acquisition, or perfection, of a right or title to the subject of the action during the pendency thereof will not remedy the defect so as to enable him to maintain the action * * *."

requirements of Section 15(4) to be avoided by a finding of a violation under Section 3(1).

This Court has often held that the purpose of a proviso is to take a "class of cases out of the operation of the body of the section to which it is found."[60]

It would therefore appear that the error of the Commission as to Section 3 was in finding a violation of Section 3(1) and in holding that such violation was "closely related" to Section 15 (R. 33), and a basis for establishing a through route.

Legislative History of Section 3(1) Confirms our Position.

Support for our position is to be found in the legislative history which added the proviso to Section 3(1) of the Act. It was added by S. 2009, Section 5(a)(1) in 1940 (54 Stat. 902). This bill was reported at the first session of the Seventy-Sixth Congress. Senate Misc. Reports 11, Serial 10293, Report No. 433.[61]

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60 *McDonald v. United States*, 279 U. S. 12. *United States v. Morrow*, 266 U. S. 531. *American Airlines v. Civil Aeronautics Board*, 178 F. 2d 903, 906 applies this rule to a transportation statute. See also 82 C. J. S. 883.

The Congressional Record reveals that when the 1940 amendments to the Act were being considered by the Congress, the Chairman of the Legislative Committee of the Interstate Commerce Commission (Eastman) wrote a letter to Senator Wheeler as to meanigg of provisos in legislation stating:

"normally a proviso is used to except from the operation of law something which otherwise would be governed by that law * * *" (Congressional Record, Vol. 86, Part 10, page 11619, Sept. 6, 1940.)

61 The report on this Bill stated:

"The importance of a sound transportation system is recognized by all. It is likewise apparent to even the unobserving that this nation cannot enjoy a sound transportation system if its most important carrier faces ruin and chaos."

The original Senate Bill would have granted the Commission complete freedom of the short haul prohibition as advocated by the Commission. The House rejected the Senate Bill. House Misc. Rep. VI, Seventy-Sixth Congress, 1st Session, Report No. 1217.

The first Conference Report, April 26, 1940, appears to have reported Section 3(1) in the form in which it was finally enacted. House Misc. Reports 11, Seventy-Sixth Congress, 3rd Session, Report No. 2016, page 6, Serial 10441.[62]

Upon further disagreement as to the Bill, it appears there was a second Conference Report, dated August 7, 1940. House Misc. Reports V, Seventy-Sixth Congress, 3rd Session, Report No. 2832, Serial 10444. There appears to have been no change in the proposed Section 3(1), (p. 6) and the statement of explanation is identical to that quoted above in the first conference report (p. 65).

That the final enactment in 1940 compromised both extremes and provided strong barriers against the establishment of through routes is shown in the remarks of Senator Wheeler on September 9, 1940.[63]

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62 The statement as to Section 5 of the Bill said:

"Section 6 of the House amendment amended section 3(1) of the Interstate Commerce Act, which makes it unlawful for any common carrier subject to Part I to give any undue preference, or cause undue prejudice, to any person, locality, port, port district, gateway, or transit point, or to any particular description of traffic. The House amendment added the words 'region, district, territory' to the list of places and localities.

"The conference substitute in section 5 retains this amendment and adds a proviso that this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." (pp. 61-62.)

63 "The conference substitute, section 10(b) contains a compromise provision on this point, permitting the Commission to establish a

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It thus appears that the proviso to Section 3(1) was added along with the expansion of the same section by the 1940 legislation which prohibited discrimination against any "region, district, territory." The proviso was no doubt intended to prevent any attempt to utilize the enlarged Section 3 as a means of overriding other portions of the Act including Section 15(3) and (4). There can be no question but that the Congress intended to retain and strengthen the requirements of Section 15 as against further delegations of authority under Section 3 and other portions of the Act. The true character of this Congressional intention was sensed and expressed by this Court in the recent *Great Northern* and *Thompson* decisions.[64]

Since the only finding of a Section 3 violation entered by the Commission which was favorable to the Rio Grande related to paragraph (1) thereof, the above history and analysis justifies the conclusion that the Commission improperly used subparagraph (1) and should have dismissed the complaint.

In concluding this portion of the argument it is important to observe that even if the theory advanced by Rio Grande is followed of justifying this order under

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through route where it finds that the through route proposed to be established is needed in order to provide adequate and more efficient or more economic transportation, subject to the proviso that the Commission shall give reasonable preference to the carrier by railroad which originates the traffic to the condition that the Commission shall not establish a through route and joint rates applicable thereto for the purpose of assisting any carrier that would participate therein to meet its financial needs." (Congressional Record, Vol. 86, Part II, page 11768).

64 *U. S. v. Great Northern R. Co.*, 343 U. S. 562. *Thompson v. United States*, 343 U. S. 549.

Sections 1 and 3 of the Act, the conclusion is inescapable that no case for relief thereunder is established by the evidence, and the action must be dismissed. Rio Grande therefore does not have any violation of the Act that can be utilized to circumvent the requirements of Section 15(4).

No Discrimination as to Transit Privileges can be Based on Section 3.

The analysis just made as to the history and purpose of the proviso in Section 3(1) demonstrates that no claim can be asserted against the Union Pacific under Section 3 based on transit privileges. Independently of this proviso, however, it is well settled that a transit privilege is local in character, subject to control of the carrier serving the shipper, and provides no legal basis for a finding of a violation of Section 3. The decisions establishing this rule are referred to in the prior section of this brief.

The leading decision of this Court, which has been cited and followed in this respect by the Commission is *Central R. R. Co. v. United States*, 257 U. S. 247. That was a shipper's application for transit. The Commission had granted relief under Section 3. This Court annulled the order, saying the Commission sought to accomplish by "indirection" what is governed and measured by another section of the Act. In so doing this Court stated at page 259 that under the Commission view "the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers."

The majority opinion of the district court in this case follows the decision just cited and quotes it to the effect that what "Congress sought to prevent" by Sec-

tion 3 was "not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers"; and the majority opinion specifically emphasizes that under any other application of Section 3(1) "Sec. 15(4) would be practically emasculated" (R. 164).

Decisions Relied Upon by Rio Grande are Inapposite.

Typical of the argument advanced herein on behalf of Rio Grande is the suggestion of the Government that since this Court in *New York v. United States*, 331 U. S. 284, held that "interterritorial class rates" involving "many carriers" over a large part of the country could be reached by the Commission under Section 3(1), this section "would appear to cover the preference and prejudice which results from the refusal of a single carrier to establish through routes and joint rates with another". (Jurisdictional Statement; page 12.) This is the sort of *non sequitur* that has permeated this case. The *New York* case presented no problem whatever of establishing through routes or joint rates. It involved only a claim of regional discrimination against the south and there is not a single reference in the long opinion to the problem of creating a new through route. Accordingly, whatever authority was exercised under Section 3(1) has no relationship whatever to a through route problem under Section 15(4).

The *New York* decision was heavily influenced by the 1940 amendment to Section 3(1) which "extended" and "enlarged" the language to include any "region". (pp. 297, 299). But no mention was therein made of the proviso which was simultaneously added to this section, as discussed previously, forbidding the application of this

enlarged Section 3(1), to discrimination against the "traffic of any other carrier of whatever description". This proviso was not involved in the *New York* case, but it is certainly applicable to the instant litigation.

In this connection the *New York* opinion stresses that it is not concerned with "discrimination against actual shippers" or "discrimination against a particular commodity" but with discrimination and prejudice against a "territory as a whole" (pp. 309, 334). There isn't the slightest suggestion in the opinion that the long-established rules as to what constitutes discrimination are changed. At page 305 it is emphasized that "mere discrimination does not render a rate illegal under § 3". The holding in the case that discrimination was established is based on the conclusion that differences in rate structures are "not warranted by territorial conditions". (p. 332) The decision cites and follows *Central R. R. Co. v. United States*, 257 U. S. 247, 259, in stating that "mere participation in joint rates does not make connecting carriers partners in discrimination".

The decision in *A., T. & S. F. Ry. v. United States*, 279 U. S. 768, cited by Rio Grande, upheld Commission action in cancelling a tariff on grain to Kansas City that would have excluded other carriers from carrying such grain from Kansas City to the gulf. The opinion points out that there is "no occasion" to consider whether there was a through route on another railroad involved in the case (p. 775) since the shipment to Kansas City and from there to the gulf are "entirely distinct" and do not necessarily involve the same grain (p. 779). The Court holds that the case obviously presents only a rate question and no carrier had any right to "recapture" the traffic at Kansas City (pp. 776, 780).

Texas & Pacific Ry. Co. v. U. S., 289 U. S. 627, presented a claim by Galveston, Texas, that it was prejudiced and New Orleans was preferred in commodity rates on export, import and coastwise traffic. The Commission found that shipping distances were from 162 to 213 miles shorter to the Texas port from interior shipping points than to New Orleans (p. 656). It was held that only Section 3(1) could be considered (p. 633) and since New Orleans carriers "do not reach" the Texas ports "with their own lines" (p. 634) and do not have "effective control" over rates to the latter ports, no discrimination is established, even though there may be "participation in joint rates with the lines to Texas ports" as required by Section 1(4) of the act (p. 648). The opinion cites and follows the *Central Railroad case, supra*, (p. 650) and points out that the principle which is controlling has been followed by the Commission with the approval of the Court "for more than forty years" (p. 654). This principle, the Court holds, bars the use of Section 3 of the act to "divert traffic through the complaining gateway" (p. 639) there being no "power" in section 3 to "build up the Texas ports by diverting export and import traffic to them" (p. 646). This opinion, we submit supports in every way the position of the Union Pacific and the five States in the instant case.

Chicago, I. & L. Ry. v. U. S., 270 U. S. 287, also cited by Rio Grande, involved discrimination of 4 steam railroads in denying an electric line switching services within Michigan City, Indiana, that were granted to each other. While only one of the steam railroads had physical connection with the electric line it was held that each of such roads was an "effective instrument" (p. 293) of discrimination and an alternative order was entered under which the steam roads were "free to remove the dis-

crimination by any appropriate action" (pp. 292-293). As pointed out in *Texas & Pacific Ry. Co. v. U. S., supra*, at page 652, each defendant in the Michigan City case was "solely responsible" for the discrimination in local switching service and the case is readily distinguishable upon such basis.

A case frequently cited by Rio Grande in this case is *Virginian Ry. v. United States*, 272 U. S. 658. That decision not only fails to sustain any contention of Rio Grande but demonstrates that the claims of discrimination and prejudice against shippers herein are not established. The *Virginian* case involved a complaint, not by a railroad seeking to improve its financial position, but by 54 coal shippers located on the Virginian who complained of undue prejudice because their rates to the west were so much higher than rates of 45 competing coal shippers located in the same area on the Virginian Railway.

No question of short-hauling was involved in the *Virginian* case. The order was not "sought or made" under Section 15(3). The complaint did not seek through routes or joint rates, and they were not ordered. The Commission merely ordered the carriers to "cease and desist" from collecting from the 54 mines to western destinations rates in excess of those paid by the 45 mines. There is no suggestion or evidence in the instant case of any competition or discrimination between shippers located on the Union Pacific line and therefore no prejudice or discrimination is available as a basis for a Section 3 order.

Further proof that the *Virginian* case is consistent with our position is found in the reference in the *Vir-*

ginian case (p. 665) to *United States v. Illinois Cent. R. R.*, 263 U. S. 515, and *United States v. Pennsylvania R. R.*, 266 U. S. 191, as involving in "essence" the "same" situation as the *Virginian* case. In the *Illinois R. Co.* case discrimination was found because the "joint through rate" for lumber for a shipper at Knoxo, Mississippi, was "2 cents" higher than on all shippers "within the so-called blanket territory" although the "distance to the northern markets from many of the points on these lines is much greater than the distance from Knoxo, which lies near the centre of the so-called blanket territory" (p. 519). Since a consideration of all transportation factors demonstrated that "discrimination" existed, it was held that the conclusion reached was not "inconsistent" with decisions such as *Central R. R. Co. v. United States*, 257 U. S. 247, cited by carriers (p. 520). The opinion by Mr. Justice Brandeis emphasizes that the "order does not require a reduction of the through rate" (p. 526) since the discrimination may be removed by raising other rates. So here, if as the Commission found but the district court denied, there is any discrimination against shippers using the Rio Grande, the remedy is not the requirement of through routes and joint rates that short haul Union Pacific routes, but, instead, a "cease and desist" order affording the alternative of removing the discrimination by increasing rates of Union Pacific routes or altering both sets of rates. *Texas & Pacific Ry. Co. v. U. S.*, 289 U. S. 627, 650.

In *United States v. Pennsylvania R. Co.*, *supra*, also cited as involving the "same" situation, it was held to be discrimination for two railroads serving one city to grant reciprocal free switching services between plants located on each other's lines but to refuse such arrangement within such city to plants on a third railroad's lines. The

opinion, also written by Mr. Justice Brandeis, says it resulted in undue prejudice where the "facilities in question were granted to some and refused to others" (p. 199).

Both of the two cases just reviewed, involving the "same" situation as the *Virginian* case, demonstrate why this Court said in the recent *Thompson* case, *supra*, in footnote 18, at page 560, that the *Virginian* case "is inapposite". The same reasons make the *Virginian* case "inapposite" to the instant proceeding.

The cases just reviewed fall in the same category as *St. Louis S. W. Ry. Co. v. United States*, 245 U. S. 136, which upheld a Commission order that "substituted for the through rate of 22 cents" a "joint rate of 16 cents" to Paducah, Kentucky, on certain lumber shipments from the south (p. 142). Since the "order operates merely to introduce reduced joint rates" (p. 143), it was held that "there is no foundation in fact or law" for a claim that the prohibitions in Section 15 with reference to new through routes were "disregarded" (p. 144). The carriers could under the order establish a new through route if they wanted to, but as stated by Mr. Justice Brandeis, the order does "not require" any carrier to "substitute" any new route or "establish an additional route" (p. 143). Moreover, it was held that the case was a rate case under Section 15(1) and not "merely one to prevent discrimination", under Section 3 (p. 145).

IV.

The Commission Arbitrarily Commingled Various Sections of the Act Which Have Independent Significance, and Misused Sections 1, 3 and Parts of Section 15 in Order to Circumvent the Requirements of Section 15(4) and Provide the Remedy Desired by the Rio Grande.

We have demonstrated that Rio Grande has wholly failed to present a case that can be sustained under any individual section of the Act. This being true, it logically follows that the order of the Commission cannot be rested upon any collective consideration or commingling of the various portions of the Act.

Both the majority and minority opinions of the court below agree that no case is established under Section 3(1) of the Act. Neither of these opinions suggests that Section 1 provides any basis for the establishment of the desired through routes. The majority opinion attempts to make a case within the orbit of the order under Section 15(4) by a finding, wholly unsupportable, that present Union Pacific routes are inadequate because shippers must pay a higher rate for shipments involving in-transit privileges on the Rio Grande. Thus, the majority would permit the establishment of a through route and joint rates merely to provide a rate advantage not now possessed by certain shippers if they use the Rio Grande. This constitutes circumvention of requirements in the Act and an intermingling and commingling of sections of the Act—a process that was seized upon by the Commission at the behest of the Rio Grande.

The operation of this process in the majority opinion and the confusion it produces is reflected in its con-

sideration of Section 3(1) of the Act. The opinion states that the Commission made a finding of a violation of Section 3(1), "for the purpose of bringing the order within the authorization of Sec. 3(1)", but that as to a violation of Section 3(1) the Commission may, "correct it irrespective of whether the factual situation authorizes the order under Secs. 15(3) and 15(4) heretofore considered." While denying there was any violation of Section 3(1) the majority opinion first indicates that if such a violation of Section 3(1) did exist, the requirements of Section 15(3) and (4) could be by-passed. Such a position, we have seen, does not reflect the language and particularly the proviso to Section 3(1) and does not represent the law. But after indicating the position that Section 3(1) might be used to destroy Section 15(4), the same opinion holds that "Sec. 15(4) would be practically emasculated" if the Commission could order through routes and joint rates to equalize transportation advantages on competing railroads (R. 164). Yet, the majority opinion holds that the order is "valid for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3(4) of the Act" at points along the Bamberger Railroad between Ogden and Salt Lake City (R. 168).

The dissenting opinion of Circuit Judge Johnsen respects the independent significance of individual portions of the act.[65] He states (R. 178) that relief could not

[65] Judge Johnsen states:

"I have grave legal doubt whether the Commission's power to establish joint rates under section 15(3) has any relationship to the term 'more economic transportation' in section 15(4), dealing with the Commission's right to open up through routes."

This same opinion describes the "confusion in which the Report has been wrapped" and the "attempt by the Commission to gain a new foothold under another disguise." (R. 174.)

be predicated under Section 3(4), and the result the Commission reached was effected only by an "escape" from "realities through a dissolution of them under the considerations open to the Commission in section 15(4), such as the Commission here attempted". The finding of the Commission as to the Bamberger Railroad, under Section 3(4), represented, according to Judge Johnsen, the "Commission's apparent attempt to strike at as much in the present situation as possible" (R. 179).

In an effort to buttress its order the Commission invoked Sections 15(3) and (4) and said that issues with reference to the "reasonableness of the assailed rates" and "discrimination between connecting lines" were properly presented, and that all of such "issues are closely related and will be considered together" (R. 33). The Commission also said its conclusion and order was "also supported and emphasized by the situation with respect to the operation of many of the in-transit privileges and services" (R. 70).

The confusion in the Commission's handling of the case and its commingling independent provisions of the Act is shown by the order entered pursuant to its report. It orders three different sets of rates and represents the height of uncertainty and indefiniteness. The requirements in this rate order and the relationship of the various provisions, defy analysis. This result is the natural culmination of the process followed throughout the case by the Commission.

Although purporting to base its order on Section 15(4)(b), there is a complete failure by the Commission to spell out with simplicity and clearness and with reason-

able certitude the ground and basis for its order as required by the decisions of this Court.[66]

That the Commission cannot evade the requirements of Section 15(4) by the "form of its order" was settled in 1952 by this Court in *Thompson v. United States, supra.*[67] This holding was consistent with earlier declarations with reference to the "form" of Commission actions.[68]

The process that was followed by the Commission in this case of scrambling the various sections of the Act and utilizing them promiscuously in order to provide the desired results has been condemned by this Court. Perhaps the leading decision, in view of the precise situation now presented, is *Central R. R. Co. v. United States*, 257 U. S. 247. In that case the complainant, American Creosoting Co., had a plant at Newark that was "connected by switch tracks with the Central and the Pennsyl-

66 *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510-511.

67 At pages 559-560, the Court said:

"Acceptance of this argument would mean that Congress' insistence on protecting carriers from being required to short-haul themselves could be evaded whenever the Commission chose to alter the form of its order. The Commission, by using the form of order employed in this case, could also divert traffic from existing through routes to the lines of a weak carrier solely to assist that carrier to meet its financial needs, thereby evading completely the applicable prohibition of Section 15(4), before the Court in United States v. Great Northern R. Co., 343 U. S. 562 (decided this day). In short, acceptance of the Commission's argument would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage."

68 In *So. Pacific Co. v. Interstate Comm. Comm.*, 219 U. S. 433, 442, this Court said:

"* * * the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power."

vania" railroads. These carriers refused to "establish there the privilege known as creosoting-in-transit" and claim was made that this refusal was "unjust and unreasonable" in violation of Section 1 of the Act and "also unjustly discriminatory, in violation" of Section 3 (p. 254), because those roads had joint rates with others that offered that transit privilege on their lines.

Complainant joined 21 other "railroads located in the Trunk Line territory and New England" in the action. Relief was denied under Section 1 but granted under Section 3 by the Commission.

The opinion by Mr. Justice Brandeis points out (p. 255) that neither the Central nor Pennsylvania, on which complainant was located "accords the creosoting-in-transit privilege at any points on its lines", nor is the privilege granted by any other carrier in Trunk Line territory so far as is material here. The claimed discrimination arises by reason of "competitors" of complainant with plants in "Mississippi, Indiana, Illinois, Ohio and Pennsylvania"; and the "several railroads on which these plants are located have, each acting independently, established the privilege at the places where those plants are situated".

The respondent railroads in the proceeding did have through routes and "joint rates" passing through the "points at which this privilege prevails and also through Newark" (p. 256). But the opinion holds that the granting of transit is a "matter local to the railroad on which the transit point is situated", the revenue therefrom being retained entirely by the local carrier, and such transit may be granted by a carrier "without consulting connecting carriers" (p. 255).

Granting, the opinion states, that Section 1 may empower the Commission to "determine whether in a particular case a transit privilege should be granted or should be withdrawn", the Commission may not "accomplish by indirection" under Section 3 what it may lawfully do under Section 1 (p. 257). The opinion holds that the two railroads on which complainant was located are "powerless to cause these connecting carriers to withdraw the privilege" (p. 258). The opinion emphasizes at page 259 that to find discrimination under such circumstances would make "the legality or illegality of a carrier's practice" depend "not on its own act, but on the acts of its connecting carriers".

Now, if the foregoing result is true in the case of transit privileges "independently" established by connecting carriers with whom defendant carrier has established through routes and joint rates, then, *a fortiori*, such result would have to be the same, as in the instant case, where through routes and joint rates via the Rio Grande have not been established. By the same reasoning, if it is improper to invoke Section 3 to enforce Section 1, then it is equally improper to attempt the reverse or to use any other section to enforce or circumvent Section 15(4). Moreover, this same line of reasoning prevents Section 15(4) from being used as a vehicle to equalize rates or privileges under Sections 1, 3 or any other provision of the Act.

The Commission has direct and definite power to remedy violations of Sections 1 and 3 of the Act. It cannot seize its through route and joint rate powers to provide reasonable rates under Section 1 or to prevent undue prejudice or discrimination under Section 3. As noted earlier, the Commission in this case has improperly used

its through route power to remedy at least three separate and distinct rate and discrimination findings.

The special power to establish through routes was not conferred until 1906. This power is wholly independent of the authority to pass upon the reasonableness of rates given the Commission in 1887. The power to require joint rates may not be exercised except upon a finding of public interest. *A., T. & S. F. Ry. v. United States, supra.*

There is no authority in Sections 1(4) or 3(4) to order joint rates. If these sections may be used as a basis for a joint rate order then the enactment of Section 15(3) was a useless gesture.

In previous cases the Commission has held that Section 1(4) is "subordinate" to the specific provisions of Section 15 and the authority in Section 15(3) "is subject to the limitations, among others, in section 15(4)."[69]

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69 See *North American Coal Corp. v. Pennsylvania R. Co.*, 278 I. C. C. 675, 679, 683 and cases cited in this brief, *supra*, Section III, footnote 49.

In *Port of New York Authority v. A., T. & S. F. Ry. Co.*, 144 I. C. C. 514, 517, the Commission refused joint rates, saying:

"While we have the power under section 1 to find combination rates unreasonable upon a proper showing, we must in such cases safeguard the carriers' rights under the short-haul provision of section 15 * * *. In numerous cases we have permitted carriers to cancel joint rates or restrict routing, which had the effect of leaving higher combination rates to apply over certain routes, when it appeared that they did so in order to safeguard their long haul. We have done this on the principle that we have no power to prevent the cancellation of a through route if we could not have established the route as an original proposition. See The Ogden Gateway Case, 35 I. C. C. 131, 140; Routing of Coal from Western Maryland Ry. Mines, 66 I. C. C. 103, 107; Routing of Sheep, 69 I. C. C. 4, 6."

In *Nicholson Universal S. S. Co. v. Pennsylvania R. Co.*, 203 I. C. C. 637, it was held at page 647 that what is now Section 3(4) "does not include within its terms any reference to routes."

Legislative History of the Through Route Provision of Section 15 Confirms Our Position.

The legislative history of the through route provision of Section 15 shows that any idea that this provision might be used to enforce other provisions of the Act was dispelled by an amendment made in 1910. Previous to that amendment the provision contained language that the through route power might be utilized "when that may be necessary to give effect to any provision of this Act". In 1910 the quoted language was eliminated.[70]

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70 As originally enacted in 1906 (34 Stat. 590) the through routes provision of Section 15 read as follows:

"The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, *when that may be necessary to give effect to any provision of this Act*, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line."

If the italicized language justified the view that the power to order new through routes might be used to enforce other provisions of the Act, the omission of this language after 1910 must be construed as indicating a contrary intention.

CONCLUSION

For the foregoing reasons, this Court should affirm the part of the judgment of the district court involved in the appeals in Nos. 117 and 119 and reverse the portion of the judgment of the district court from which this appeal is taken (No. 118) and remand the case to the district court with direction to issue the injunction and relief prayed by the plaintiffs in that court.

Respectfully submitted,

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PROOF OF SERVICE

I, BERT L. OVERCASH, counsel of record for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 15th day of March, 1956, I served, on behalf of all Appellants herein, copies of the foregoing brief on the several adverse parties in Nos. 117, 118, 119, 332, 333 and 334, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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3. On the United States Department of Agriculture by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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5. On Idaho Farm Bureau; Public Service Commission of Utah; Committees of Railroad Brotherhoods who work for The Denver and Rio Grande Western R. R. Co.; National Live Stock Producers Association; Pueblo Chamber of Commerce; Arkansas Valley Stock Feeders Association; Colorado Wool Growers Association; Western Forest Industries Association; Koppers Company,

Inc.; Utah Growers Cooperative, Inc.; Knudsen Builders Supply Company, Inc.; and Structural Steel and Forging Company, by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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6. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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7. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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APPENDIX A

The Pertinent Provisions of the Interstate Commerce Act (United States Code; Title 49), Involved in this Case are as Follows:

National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1(3)(a)—

"* * * The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit,

ventilation, refrigeration or icing, storage and handling of property transported. * * *"

Section 1(4)—

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 1(5)—

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 3(1)—

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district,

gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3(4)—

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15(1)—

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or

property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3)—

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classification, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the

terms and conditions under which such through routes shall be operated. * * *"

Section 15(4)—

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financal needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."